

# The Modern American

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## Volume 4, Issue 2

# THE MODERN AMERICAN

A Publication Dedicated to Diversity in the Law



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# LETTER FROM THE EXECUTIVE BOARD

Ellen Spencer Mussey and Emma Gillett founded both the Washington College of Law (“WCL”) and D.C.’s Women’s Bar Association (“WBA”) at a time when women did not receive full and equal participation in society, a time when women were not allowed to participate on a jury, practice law, or even vote in elections. Over a hundred years later, a lot of progress has been done, but our society has yet to create total equality; as Hillary Clinton stated in her concession speech for the Democratic nomination, “[a]lthough we weren’t able to shatter that highest, hardest glass ceiling this time, it’s got 18 million cracks in it.”

By challenging oppressive norms and educating our community on diversity and the law, *The Modern American* continues to chip away at the glass ceiling. In recognition of these continuing struggles, we proudly dedicate this issue to women in the law. To celebrate the legacy of our founders and honor our shared history, our magazine hosted a Women’s Bar Association event on October 16<sup>th</sup>, 2008, and welcomed the WBA’s historic archives to the law school’s Pence Law Library.

This issue features the winning essay of a joint WBA-TMA writing competition, as well as an article describing the shared history of the WBA and WCL, and interviews with notable women in the legal profession.

This issue also presents an array of topics such as the death penalty and its racial undertones, the rights of transgendered individuals, the rights of parents to teach hate speech to their children, and the rights of Native American communities, to name a few.

We have a lot to look forward to in 2009. On April 2009, *The Modern American’s* Fourth Annual Symposium will gather renowned scholars, who will address the separation of church and state and the regulation of morality as it affects cross-cultural relations in our community. Additionally, we will welcome a new Executive Board. And, beginning with this issue, our publication will be printed in an environmentally friendly manner. Finally, subscribers will now be able to access *The Modern American* through V.lex, LexisNexis, and the Westlaw database.

In closing, we hope our issue inspires you to continue fostering the discourse on diversity and embracing everyday change in your community.

Sincerely,

The Executive Board  
*The Modern American*

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# FAIR HOUSING LAWS AND THE CONSTITUTIONAL RIGHTS OF ROOMMATE SEEKERS

By  
Chris A. Kolosov\*

## INTRODUCTION

Imagine a biracial, heterosexual, female Buddhist, new to Los Angeles and looking for a place to live. Short of money, she notes the following roommate-wanted ads:

1. We are three Christian females... We have weekly bible studies and bi-weekly times of fellowship.<sup>1</sup>
2. The person applying for the room MUST be a BLACK GAY MALE.<sup>2</sup>
3. This is a Christian home and we are looking for a Christian female to rent a downstairs room.<sup>3</sup>

She is unwelcome in at least two of the apartments, but each ad is presumptively illegal. Fair housing laws prohibit discrimination based on religion, race, sex and, in some jurisdictions, sexual orientation.<sup>4</sup> The federal Fair Housing Act ("FHA") and many state statutes and municipal ordinances exempt "Mrs. Murphy"<sup>5</sup> landlords, who rent out rooms or apartments in smaller buildings where they reside. These landlords can usually discriminate when selecting tenants, so long as they do not advertise preferences or state discriminatory reasons for rejecting applicants.<sup>6</sup> In most states, these exemptions apply to roommate-seekers, but some jurisdictions are more restrictive.<sup>7</sup> Further, the Supreme Court has held that the Civil Rights Act of 1866<sup>8</sup> prohibits racial discrimination and many forms of national origin discrimination in housing,<sup>9</sup> and several lower courts have concluded that the FHA does not preclude claims under the 1866 Act.<sup>10</sup> Thus, both Mrs. Murphy landlords and roommate seekers could be held liable for refusing to rent to people who are protected under the 1866 Act.

Today, people seeking roommates outnumber classic Mrs. Murphy landlords,<sup>11</sup> but, despite the distinct compatibility concerns involved, fair housing laws do not acknowledge this group as a separate category. Whereas boarding house owners may impose rules upon tenants,<sup>12</sup> compatibility is particularly important to roommates as their conflicts are typically resolved through discussion and compromise. Many landlords who enjoy the Mrs. Murphy exemptions merely rent out separate apartments in buildings where they also reside. In this article, I explore whether fair housing laws violate the intimate association, privacy, and free speech rights of people seeking roommates to share their kitchens, bathrooms, and other common living areas. I examine three types of laws: prohibitions on using discriminatory criteria when selecting a roommate, prohibitions on placing discriminatory advertisements, and prohibitions on making discriminatory statements when interviewing potential candidates.

In Part II, I describe several adjudications in the roommate context, including cases brought against Internet sites that provide forums and matching services for roommate seekers. In Part III, I examine laws that bar discriminatory selection and conclude that federal intimate association and privacy rights, as well as privacy rights granted by the California constitution, are violated if individuals do not have a completely free choice in

selecting a roommate. In Part IV, I analyze advertising restrictions from both an intimate associate and privacy perspective and under the commercial speech doctrine. I determine that, although such restrictions survive intimate association and privacy challenges, only restrictions on discriminatory ads related to race, ethnicity or national origin survive a free speech challenge. In Part V, I explain why prohibitions on discriminatory statements are even more problematic, violating free speech, privacy and intimate association rights. I conclude that, while it is wise policy to allow roommate seekers greater leeway in advertising some preferences, restrictions on ads expressing preferences related to race, national origin and ethnicity are not only constitutional, they are likely to advance the goals of the Fair Housing Act.

## II. THE ADJUDICATION OF ROOMMATE DISCRIMINATION CLAIMS

Agency commissioners, and state and federal judges, have adjudicated cases brought by rebuffed roommate applicants. A brief survey of a few such cases provides context for the constitutional rights discussion that follows.<sup>13</sup>

### 1. PROHIBITIONS ON DISCRIMINATORY ROOMMATE SELECTION AND STATEMENTS

In *Department of Fair Employment and Housing v. Larrick*,<sup>14</sup> two Caucasian women were seeking a third roommate "to share their unit and help pay the rent."<sup>15</sup> During a phone conversation, one of the women told a bi-racial applicant that her other roommate did not want to live with a black person. The roommate seekers were found liable<sup>16</sup> for discriminating on the basis of race and for making racially discriminatory statements. None of the exceptions to California's Fair Housing code applied to the respondents because more than one roomer or boarder lived in the dwelling.<sup>17</sup>

In *Marya v. Slakey*,<sup>18</sup> an applicant sued the owner of a six-bedroom house after a co-tenant discriminated against her. The tenants executed a single lease and advertised and filled vacancies after one-on-one interviews. Decisions on which candidate to select had to be unanimous, and all tenants had to be non-smoking, vegetarian students. One tenant declined to interview the applicant, explaining that two Indian women already lived in the house, and he did not want to live "with three people of the same cultural orientation."<sup>19</sup> The applicant alleged she had been denied housing on the basis of her race, color, national origin and/or sex.<sup>20</sup> The court held that the Mrs. Murphy exemption did not apply and would not have permitted discriminatory statements in any case. The court did not conclude that the roommates were entitled to any special protections when creating criteria for cohabitants.<sup>21</sup>

## 2. PROHIBITION ON DISCRIMINATORY ROOMMATE SELECTION

The Wisconsin Court of Appeals reviewed a local ordinance prohibiting discrimination on the basis of sexual orientation in *Sprague v. City of Madison*.<sup>22</sup> Two roommates extended an offer to a lesbian but later withdrew it, stating that they were not comfortable living with her. The court held that the ordinance unambiguously applied in all housing rentals and rejected the appellants' argument that it was unconstitutional in the roommate context: "Appellants gave up their unqualified right to such constitutional protections when they rented housing for profit."<sup>23</sup> Subsequent to commencement of the case, Madison's City Council had amended the ordinance<sup>24</sup> to exempt roommates, but the court nonetheless held the defendants liable.<sup>25</sup> The court's conclusion that the solicitation of co-roommates constitutes "renting housing for profit," and that renters who do so forfeit their privacy and First Amendment rights, may mean that people who lack the resources to live alone are particularly at risk of facing infringements on their constitutional rights.

## 3. PROHIBITIONS ON STATEMENTS/ADVERTISEMENTS EXPRESSING PREFERENCES

In *Department of Fair Employment and Housing v. DeSantis*, a woman renter sought a roommate to share her two-bedroom apartment "to help pay the rent."<sup>26</sup> An African American male potential renter stated that the advertised room was too small, and asked to see the other bedroom. The woman refused, indicating it was her room. The applicant later claimed that she told him no room was available, and that she had denied him the rental due to his race. A housing-rights group sent one Caucasian and one African American tester to the apartment. The respondent told the Caucasian tester that she "really [doesn't] like black guys. I try to be fair and all, but they scare me."<sup>27</sup> She was legally permitted to discriminate in selecting a roommate under California's single roomer exemption, but was held liable for making a discriminatory statement.<sup>28</sup>

In *Fair Housing Advocates Association v. McGlynn*,<sup>29</sup> a black female responded to an ad seeking a female roommate placed by a white male. After inquiring about her race, he told her "blacks should live with blacks and whites should live with whites."<sup>30</sup> A fair housing organization then had testers contact the respondent.<sup>31</sup> His behavior suggested he may have been seeking not just roommate, but a girlfriend.<sup>32</sup> He asked a black tester about her occupation, if she smoked or drank, if she had a boyfriend and why she was not living with him, and if it would bother her that he was a white smoker who drank.<sup>33</sup> He invited her to the apartment, but she left after he asked her if she wanted a massage and then asked for a kiss.<sup>34</sup> The respondent was found liable for placing a discriminatory ad and for making discriminatory statements.<sup>35</sup>

*The Court's decision may mean that people who lack the resources to live alone are particularly at risk of facing infringements on their constitutional rights.*

## 4. PERMITTING SEXUAL ORIENTATION DISCRIMINATION

The commissioners in *Department of Fair Employment and Housing v. Baker*<sup>36</sup> concluded that California's statute prohibiting sexual orientation discrimination did not apply to a roommate seeker. The respondent rejected a lesbian applicant via voicemail, stating his other roommate was a Christian Fundamentalist, and they "would not get along too well."<sup>37</sup> The commissioners explained that sexual orientation discrimination was incorporated into California fair housing law through the Unruh Civil Rights Act,<sup>38</sup> which applies only to "business establishments,"<sup>39</sup> and "does not apply to those relationships that are truly private."<sup>40</sup> They further stated "truly private and social relationships" are protected by the right of intimate association, and held that the record did not reveal whether the respondent's housemate relationship "was sufficiently non-continuous, non-personal and non-social to preclude being a constitutionally protected intimate association."<sup>41</sup> The facts were thus insufficient to show that his "housing operation constituted a 'business establishment' rather than a constitutionally protected intimate association."<sup>42</sup>

## 5. CASES AGAINST INTERNET FORUMS OR ROOMMATE SEARCH SERVICE PROVIDERS

In *Chicago Lawyers Committee for Civil Rights Under Law, Inc. v. Craigslist, Inc.*,<sup>43</sup> a public interest consortium alleged that it had diverted substantial time and resources away from its fair housing program responding to Craigslist's publication of discriminatory classified ads.<sup>44</sup> Many ads appeared to have been placed by roommate seekers.<sup>45</sup> The court held that Craigslist was afforded immunity by the Communications Decency Act (CDA),<sup>46</sup> under which providers of an interactive computer service are not to be treated as the publisher of information created by another content provider. Because Craigslist served only "as a conduit" for information provided by its users, it was not liable for ads that violated fair housing laws.<sup>47</sup> Roommate seekers who place discriminatory ads may nonetheless be held individually liable

as the content providers. Although the court's analysis focused on the CDA, in affirming the decision of the district court, the Seventh Circuit hinted at the constitutional rights issues raised by the case, stating: "[A]ny rule that forbids truthful advertising of a transaction that would be substantively lawful encounters serious problems under the First Amendment."<sup>48</sup>

An online roommate matching service was similarly sued in *Fair Housing Council v. Roommate.com*,<sup>49</sup> but with a very different outcome. Subscribers to the service respond to questionnaires by selecting answers in drop-down menus.<sup>50</sup> The Ninth Circuit concluded that "By requiring subscribers to provide the information as a condition of accessing its service, and by providing a limited set of pre-populated answers, Roommate becomes much more than a passive transmitter of information provided by others; it becomes the developer, at least in part, of that information."<sup>51</sup> The Court thus remanded the case for a

determination as to whether Roommate's publication of certain postings violates the FHA, "or whether they are protected by the First Amendment or other constitutional guarantees."<sup>52</sup>

### III. OUTRIGHT BANS ON DISCRIMINATION

#### 1. FEDERAL INTIMATE ASSOCIATION AND PRIVACY RIGHTS AND DISCRIMINATORY SELECTION

In *Roberts v. Jaycees*, the Supreme Court suggested that the Fourteenth Amendment right to intimate association encompasses roommate relationships, explaining that "highly personal relationships" are protected because "individuals draw much of their emotional enrichment from close ties with others."<sup>53</sup> Though the Supreme Court specifically identified family relationships, the Court imagined other relationships would be similarly protected:

Family relationships, by their nature, involve deep attachments and commitments to the necessarily few other individuals with whom one shares not only a special community of thoughts, experiences, and beliefs but also distinctively personal aspects of one's life. Among other things, therefore, they are distinguished by such attributes as *relative smallness*, a high degree of *selectivity* in decisions to begin and maintain the affiliation, and *seclusion* from others in critical aspects of the relationship. As a general matter only relationships with these sorts of qualities are likely to reflect the considerations that have led to an understanding of freedom of association as an intrinsic element of personal liberty.<sup>54</sup>

The identification of "selectivity in decisions to begin and maintain the affiliation" underscores that relationships beyond blood ties are protected. Because people cannot choose their families, if only familial relationships were protected, identifying "selectivity in decisions to begin" the association as a criterion for determining whether a relationship is protected would be incongruous. Roommate relationships, in particular, are characterized by each of the three factors identified by the Court in *Roberts*. They are *small*, usually including no more individuals than there are bedrooms in a dwelling. Most people are quite *selective* when deciding to live with another person—they are choosing someone who will have access to their possessions, pets and personal information. And roommate relationships are highly *secluded*. Roommates often see each other in their pajamas or underwear, and when they are sick, exhausted, or just sad. People often hide from the rest of the world aspects of themselves that are unavoidably revealed in the privacy of the home.<sup>55</sup>

Thus, denying the right to choose cohabitants based on personal criteria profoundly violates personal liberty, and fair housing laws that ban discrimination outright should be subjected to strict scrutiny's least restrictive means test. Yet, as "liberty and autonomy" mean little if individuals are powerless to decide with whom to create intimate relationships,<sup>56</sup> no means of combating housing discrimination could be *more* restrictive.

Prohibiting discriminatory selection only when housing is not shared is a reasonable alternative because the result would likely be the same. Because a roommate seeker may consider many factors—compatible schedules, similar tastes in music or television—she can state many reasons for rejecting an applicant, even if consciously or unconsciously her motivation is discriminatory preference. Furthermore, the exemption of Mrs. Murphy landlords from all but the advertising and statement prohibitions illustrates Congress's belief that certain privacy interests are important enough to justify some sacrifice of the FHA's goals.<sup>57</sup> Eliminating roommate choice is thus unlikely to pass the least-restrictive-means test.

*Village of Belle Terre v. Boraas*<sup>58</sup> has nonetheless led some to conclude that federal intimate association and privacy rights do not protect roommates.<sup>59</sup> Six students challenged a zoning ordinance limiting the occupancy of single-family dwellings to traditional families or to groups of not more than two unrelated persons. The Court determined that the ordinance did not compromise any fundamental right to association or privacy. However, a zoning ordinance that prohibits groups of people from living in certain areas is quite different from a law that affirmatively requires an individual to accept a cohabitant. The former only affects where people in an existing relationship may live, but the latter determines with whom an individual must create a relationship, at least if she cannot afford to live alone or would prefer to have a roommate.<sup>60</sup>

In *Carey v. Brown*,<sup>61</sup> the Supreme Court stressed the importance of residential privacy: "The States' interest in protecting the well-being, tranquility, and privacy of the home is certainly of the highest order in a free and civilized society."<sup>62</sup> The Court continued, "Preserving the sanctity of the home, the one retreat to which men and women can repair to escape the tribulations of their daily pursuits, is surely an important value."<sup>63</sup> Not only has the Court chosen to protect residential privacy,<sup>64</sup> it has recognized privacy within the home as a constitutional right.<sup>65</sup> The range of contexts in which the right has been recognized suggests that it includes autonomy in determining the person roommate seekers are likely to greet first in the morning and see last at day's end.

#### 2. PRIVACY RIGHTS GRANTED UNDER THE CALIFORNIA CONSTITUTION AND LAWS THAT PREVENT SEEKERS FROM ULTIMATELY SELECTING ROOMMATES

At least nine state constitutions provide privacy protections more expansive than those afforded federally.<sup>66</sup> In *City of Santa Barbara v. Adamson*,<sup>67</sup> the California Supreme Court concluded that California's privacy right<sup>68</sup> protects roommate relationships when it struck down a zoning ordinance prohibiting more than five unrelated persons from living together. The Court described the plaintiffs:<sup>69</sup>

They chose to reside with each other when Adamson made it known she was looking for congenial people with whom to share her house. Since then, they explain, they have become a close group with social, economic and psychological commitments to each other . . . they have chosen to live together mainly because of their compatibility. . . . Appellants say that they regard their group as 'a family' and that they seek to share several

values of conventionally composed families. A living arrangement like theirs concededly does achieve many of the personal and practical needs served by traditional family living.<sup>70</sup>

The Court concluded that California's right to privacy encompassed the right to live with whomever one wishes, and Santa Barbara would have to show a compelling public interest in restricting communal living.<sup>71</sup> The highest Courts of New Jersey and New York have concluded that similar zoning laws violated state constitutional privacy or due process protections.<sup>72</sup>

The three part test for invasions of privacy announced by the California Supreme Court in *Hill v. National Collegiate Athletic Association*<sup>73</sup> suggests that roommate relationships are protected beyond the zoning context and that roommate seekers should have autonomy in selecting cohabitants. If a plaintiff establishes: "(1) a legally protected privacy interest; (2) a reasonable expectation of privacy in the circumstances; and (3) conduct by [the] defendant constituting a serious invasion of privacy," the defendant must show that the invasion substantively furthers a countervailing interest.<sup>74</sup> The plaintiff may rebut that defendant's assertion by showing there are alternatives with a lesser impact on privacy interests.<sup>75</sup>

In *Tom v. City and County of San Francisco*,<sup>76</sup> an ordinance preventing tenants-in-common from excluding other co-owners from their individual dwellings was struck down under this test. After pooling resources to acquire multi-unit residential property, the co-owners signed right-of-occupancy agreements specifying who would live in which unit. The court explained the effect of the ordinance, which had been passed to discourage the conversion of rental housing to owner-occupied housing: "[U]nrelated persons . . . would be required to share occupancy of their dwelling units with each other, or could not prevent other cotenants from entering their private living space."<sup>77</sup> The court held that the city had articulated no interest that justified "an extreme privacy violation, such as rendering homeowners unable to determine the persons with whom they should live, or forcing them to share their homes with others who are unwelcome."<sup>78</sup>

Fair housing laws that prohibit discriminatory roommate selection have a greater impact on privacy. The ordinance struck down in *Tom* prevented the contractual protection of privacy, and thus tenants-in-common could theoretically have been "forced to share their homes with others who [were] unwelcome." But, as each co-owner was provided an individual dwelling by mutual agreement, it was unlikely anyone would actually invade another's dwelling. However, fair housing laws that require a roommate seeker to accept an applicant create more than a theoretical burden. They force her to share her home with someone "who [is] unwelcome."<sup>79</sup> As virtually any alternative means of combating housing discrimination would have a lesser impact on privacy, such laws are unlikely to be upheld under California's constitution.

#### **IV. PROHIBITIONS ON DISCRIMINATORY ADVERTISEMENTS**

##### **1. DISCRIMINATORY ADVERTISEMENTS AND FEDERAL INTIMATE ASSOCIATION RIGHTS**

The Supreme Court set a high bar for determining when

the right to intimate association has been violated, and federal appeals courts have followed suit. Only laws that "directly and substantially"<sup>80</sup> interfere with the relationship have been struck down, and laws creating significant burdens have been upheld even in the context of marriage, a relationship that is in most cases far more intimate than the relationships created between roommates.<sup>81</sup> Even when roommate seekers desire a close companion and not just someone to share the rent, advertising restrictions may require them to interview candidates whom they are unlikely to choose, but in most cases, the prohibitions do not prevent seekers from identifying suitable roommates and thus do not violate intimate association rights.

In *Zablocki v. Redhail*,<sup>82</sup> the touchstone case for the "direct and substantial" interference standard, the Court reviewed a statute requiring parents with child support obligations to obtain a court's permission prior to remarriage. It held that the law directly and substantially interfered with the fundamental right to marry, because it prevented people who could not prove they could pay child support from remarrying.<sup>83</sup> However, the Court made clear that laws only implicating the right to marry would not face similar scrutiny: "[W]e do not mean to suggest that every state regulation which relates in any way to the incidents of or prerequisites for marriage must be subjected to rigorous scrutiny. [R]easonable regulations that do not significantly interfere with the decisions to enter into the marital relationship may be legitimately imposed."<sup>84</sup> The Court found no significant interference in *Califano v. Jobst*,<sup>85</sup> concluding that a Social Security Act provision terminating benefits for a dependent, disabled adult upon marriage to someone ineligible for benefits did not directly and substantially interfere with the right to marry.

The Court's conclusions in *Califano* may have been influenced by its determination that the government has greater authority to attach conditions to recipients of its own benefits. However, in *Montgomery v. Carr*,<sup>86</sup> the Sixth Circuit directly contrasted *Zablocki* and *Califano* without suggesting that a different standard applied in *Califano* because a government benefit was involved. Rather, the court explained "the directness and the substantiality of the interference with the freedom to marry distinguish[ed]" the two cases. It continued: "[w]hatever the form of the government action involved . . . rational basis scrutiny will apply to the rationales offered by government defendants in cases presenting a claim that a plaintiff's associational right to marry has been infringed, unless the burden on the right to marry is direct and substantial."<sup>87</sup>

Furthermore, under the doctrine of unconstitutional conditions, the government may not require a beneficiary to surrender a constitutional right as a condition to receiving a benefit.<sup>88</sup> The Supreme Court has been unpredictable in applying the doctrine,<sup>89</sup> and has almost universally rejected challenges related to government welfare programs.<sup>90</sup> But notably, in cases involving privacy in family relationships, the explanation as to why the laws under review were not found impermissible has been that the government's condition either did not substantially deter the exercise of the rights,<sup>91</sup> or its action was not sufficiently direct.<sup>92</sup> This analysis mirrors the direct and substantial interference test discussed in *Zablocki* and applied in the lower courts.

Even presuming the threshold for direct and substantial interference varies with the government's role, nothing in the case law suggests that requiring roommate seekers to interview additional applicants rises to the level of an unconstitutional burden. Although the advertising restrictions remove a tool for



filtering out candidates whom roommate seekers are unlikely to accept, they create no limitation on seekers' ability to say yes or no to any candidate and thus do not "significantly interfere" with the right to enter into the relationship. Facial challenges succeed only where a law is unconstitutional in all or nearly all of its applications.<sup>93</sup> In the few cases where a roommate seeker could establish that the prohibitions actually prevented her from forming a roommate relationship,<sup>94</sup> she could bring an as-applied challenge. In most cases, the restrictions pass the "direct and substantial interference" test and thus do not violate the Fourteenth Amendment.

## 2. DISCRIMINATORY ADVERTISEMENTS AND OTHER FEDERAL PRIVACY RIGHTS

Roommate seekers are unlikely to show that advertising restrictions violate their privacy rights under the undue burden standard that the Supreme Court has created in other privacy contexts: access to abortion or contraceptives. In *Planned Parenthood of Southeastern Pennsylvania v. Casey*, the Court held that a twenty-four hour waiting period for abortions imposed a 'particularly burdensome' obstacle on women with the fewest resources, "those who must travel long distances, and those who have difficulty explaining their whereabouts to husbands, employers, or others,"<sup>95</sup> but that "[did] not demonstrate that the waiting period constitute[d] an undue burden."<sup>96</sup> Given this high bar, even if advertising restrictions require a person to interview ten times as many candidates in order to locate a roommate, the burden they create is unlikely to be deemed "undue," particularly because decisions involving cohabitation are less fundamental than decisions involving reproduction.

The Court's decision in *Carey v. Population Services, International*<sup>97</sup> does suggest that its standard for reviewing infringements on privacy may sometimes be lower than the abortion cases indicate. The Court struck down a New York statute permitting only licensed pharmacists to sell contraceptives, concluding that it imposed a "significant burden" on the right to use contraceptives.<sup>98</sup> At first blush, it seems this law simply made it less convenient for women to obtain contraceptives and was thus not so dissimilar from the roommate advertising prohibitions. However, the Court stated that although not a total ban, the law significantly reduced public access to contraceptives by increasing costs and reducing privacy.<sup>99</sup> In New York's many small towns in 1977,<sup>100</sup> where there may only have been one pharmacy, requiring an unmarried woman to interact with a pharmacist every time she wanted to buy contraceptives could result in a decision to forgo the purchase entirely. In his concurring opinion, Justice Brennan emphasized that the law burdened the right to prevent conception "by substantially limiting access to the means of effectuating that decision."<sup>101</sup>

To some extent, advertising prohibitions "limit access to the means" of finding a roommate, because searches become more time-consuming and costly if people must interview un-

suitable applicants. However, it is unlikely that this would be deemed a *substantial* limitation because the restrictions do not limit whom a roommate seeker may consider or where she can place her ads. They only require her to consider a broader group of applicants than she might otherwise prefer, and ultimately she controls the amount of time she dedicates to her search. Moreover, she maintains a great deal of control through her ad placement decisions. This is quite different from *Carey*, in which the restrictions on how contraceptives could be distributed resulted in a significant reduction in access not just to one's choice of contraceptive but to any contraceptives. Therefore, the restrictions on roommate ads are not unduly burdensome to the point of violating the constitutional right to privacy.

## 3. DISCRIMINATORY ADS AND PRIVACY RIGHTS UNDER THE CALIFORNIA CONSTITUTION

Under California's state privacy standard, a roommate seeker is unlikely to show that advertising prohibitions are an invasion of privacy. She must establish: "(1) a legally protected privacy interest; (2) a reasonable expectation of privacy in the circumstances; and (3) conduct by [the] defendant constituting a serious invasion of privacy."<sup>102</sup> People have a privacy interest in selecting a roommate, but not a reasonable expectation of privacy "in the circumstances." Because ads are a means of public communication, it is logical that the interests of those who read ads, and not just those who place them, would be considered

when regulating content.

Furthermore, the restrictions on discriminatory ads do not constitute a "serious invasion of privacy," because in most cases, they do not actually prevent a roommate seeker from locating a suitable roommate, but merely require him to interview additional candidates.<sup>103</sup> It is in this third step that roommate advertising differs from advertising for romantic partners. Although such romantic partner ads are also a means of public communication, people are likely to have far more particularized criteria in a greater number of areas when seeking mates.<sup>104</sup> Advertising restrictions could substantially interfere with locating a compatible companion due to the combination of character-

istics sought. Moreover, there is typically a significantly higher level of anxiety and fear of rejection<sup>105</sup> involved with "interviewing" potential lovers than there is with interviewing potential roommates. Therefore, forcing those looking for love to "interview" many more applicants does constitute a much more serious invasion of privacy.

## 4. DISCRIMINATORY ADS AND FREE SPEECH RIGHTS

The Supreme Court has explained that commercial speech may be distinguished "by its content"<sup>106</sup> and has categorized speech that "inform[s] the public of the availability, nature, and prices of products and services,"<sup>107</sup> and speech in which the speaker's interests are "largely economic," as commercial.<sup>108</sup> It has further explained that the "diverse motives, means and messages of advertising may make speech 'commercial' in widely varying degrees," but that advertising "may be subject to reasonable regulation that serves a legitimate public interest."<sup>109</sup> Roommate ads apprise the public of the availability of rental

*People have a privacy interest in selecting a roommate, but not a reasonable expectation of privacy "in the circumstances."*

housing, and although roommate relationships may be intimate, the ads placed by roommate seekers propose transactions that benefit them financially by reducing housing costs. Indeed, in the cases discussed in Part II, multiple roommate seekers indicated that their motives for seeking a roommate were financial.<sup>110</sup> Moreover, offering shared living space is not “inextricably intertwined”<sup>111</sup> with stating a roommate seeker’s discriminatory criteria regarding those with whom she wants to create an intimate association: As was discussed in Part IV.1, prohibitions on discriminatory ads rarely prevent a roommate seeker from locating a cohabitant.

Roommate ads should thus be evaluated as commercial speech, and their regulation evaluated under the four-part test articulated in *Central Hudson Gas and Electric Corporation v. Public Services Commission of New York*.<sup>112</sup> First, the speech must concern lawful activity and must not be misleading. Second, the government must assert a substantial interest. Third, the regulation must advance that interest, and fourth, it may not be “more extensive than necessary.”<sup>113</sup> This does not mean the absolute least restrictive means; rather, the government has a burden of affirmatively establishing a “reasonable fit” between its interest and the speech restriction.<sup>114</sup> If, as discussed in Part III, the right to choose cohabitants is constitutionally protected under federal intimate association or federal or state privacy rights, then discriminatory roommate ads describe lawful activity and are not misleading. Because the first prong of *Central Hudson* is satisfied in the roommate context, the government must show a substantial interest in barring the ads, and that the restrictions advance the interest asserted without being more extensive than necessary.

#### A. ADS THAT STATE PREFERENCES RELATED TO RACE, NATIONAL ORIGIN OR ANCESTRY

Achieving residential integration was one of Congress’s primary goals when the FHA was enacted in 1968.<sup>115</sup> Nearly forty years later, racially homogenous housing patterns continue to be a serious concern.<sup>116</sup> Thus, the government continues to have a substantial interest in preventing housing discrimination based on race. Despite the fact that roommate seekers may ultimately select whomever they wish as cohabitants, any racially discriminatory housing ads in public forums frustrate the integration of communities by stigmatizing minorities and creating animosity. Thus, as a means of combating racially homogenous housing patterns, a direct and concrete harm, advertising prohibitions do advance the goals of the FHA and are a means no more extensive than necessary to achieve those goals.

Admittedly, the Supreme Court’s decision in *Linmark Associates, Inc. v. Willingboro*<sup>117</sup> reveals an unwillingness to uphold laws enacted to promote integrated housing when the burden on individual rights is too great.<sup>118</sup> The Court struck down a ban on “For Sale” signs, despite a city’s contention that promoting integration justified the ordinance because fear among white homeowners that their property values would drop as the town’s black population increased had caused “panic selling.”<sup>119</sup> The Court sharply denounced the city’s restriction on the free flow of information.<sup>120</sup> However, its decision must be considered in light of the type of restriction under review. “For Sale” signs are a widely-used means of advertising the availabil-

ity of property. Thus, the city was depriving its residents of commercial speech rights enjoyed by virtually all other homeowners. In contrast, prohibitions on discriminatory housing ads are the norm, not the exception.

Furthermore, unlike “For Sale” signs that, on their face, send no stigmatizing message, discriminatory housing ads are per se harmful and inflict an immediate harm on those they degrade. In *Florida Bar v. Went For It, Inc.*,<sup>121</sup> the Supreme Court upheld restrictions prohibiting lawyers from soliciting personal injury or wrongful death clients within thirty

days of an accident under the *Central Hudson* test.<sup>122</sup> It found the attorney ads offended their recipients and tarnished the reputation of attorneys, and that the government has a substantial interest in restricting speech that both creates an immediate harm and has a demonstrable detrimental effect on a particular group. The Court distinguished its decision in *Bolger v. Youngs Drugs Products Corp.*, striking down a federal ban on direct-mail advertisements for contraceptives, on the grounds that the harm that the attorney solicitations caused could not be “eliminated by a brief journey to the trash can.”<sup>123</sup> Whereas contraceptive ads may offend some people, they did not substantially burden recipients who could simply dispose of them.

Similar to the attorney solicitations in *Florida Bar* that were likely to create “outrage and irritation”<sup>124</sup> in their recipients, racially discriminatory ads are likely to have an analogous immediate impact on those they degrade.<sup>125</sup> And, just as the Court found that disposing of the attorney solicitations did little to combat the offense they generated, once a discriminatory ad has been read, its harm is not easily undone.

Moreover, like the ads in *Florida Bar*, racially discriminatory ads create a secondary harm by perpetuating racially homogenous housing patterns. In *United States v. Hunter*,<sup>126</sup> the Fourth Circuit found a newspaper editor liable under 42 U.S.C. § 3604(c) for publishing a Mrs. Murphy’s ad for an apartment in a “white home.” The court explained how seeing significant numbers of such ads in one part of a city could deter non-whites from seeking housing in those neighborhoods, even if other dwellings were available in those areas on a non-discriminatory basis.<sup>127</sup> It further explained that prohibiting even exempt landlords from placing discriminatory ads served the FHA’s purpose because wide circulation of statements of personal prejudice could magnify their negative effect.<sup>128</sup> The wide distribution of roommate ads stating racially discriminatory preferences may similarly deter applicants from applying for roommate situations in certain areas. It is not unlikely that people with racist attitudes live in more racially homogenous neighborhoods. If an applicant sees multiple racially discriminatory roommate listings in a particular neighborhood, she may determine that it would be wiser to seek housing elsewhere, thereby perpetuating the existing housing pattern.

Further, racially discriminatory housing ads stigmatize minorities, frustrating the integration of communities. In his writings on racial stigma and African Americans, economist Glenn C. Loury describes two kinds of behavior: discrimination in contract (in the execution of formal transactions) and discrimination in contact (in the personal associations and relationships created in the private spheres of life).<sup>129</sup> Both have debilitating consequences because the rules of contract and patterns of contact control access to resources and social mobility.<sup>130</sup> “Liberty and autonomy” would become meaningless if people

*It is not unlikely that people with racist attitudes live in more racially homogenous neighborhoods.*

could not discriminate when creating personal relationships, and thus discrimination in contact must remain a prerogative.<sup>131</sup> However, differential treatment of individuals in contract—including housing—can be legitimately regulated because it significantly contributes to racial inequality and stigma.<sup>132</sup>

A 2000 study measuring preferences among various ethnic groups in Los Angeles illustrates the effects of racial stigma on housing.<sup>133</sup> Subjects were asked to imagine the racial mix of a neighborhood in which they would feel most comfortable. Forty percent of Asians, thirty-two percents of Latinos, and nineteen percent of whites envisioned neighborhoods with no African Americans, and immigrants were more likely to exclude African Americans.<sup>134</sup> This suggests that new arrivals to America are taught that African Americans are a group to be avoided.<sup>135</sup> Because discriminatory housing ads are widely circulated, they are likely to contribute to this stigmatization, even in cases in which the underlying discrimination is legal. Restrictions on roommate ads are not simply a case of the government restricting speech in order to combat the spread of beliefs with which it disagrees. Rather, it is regulating housing-related commercial speech to counteract a concrete housing-related harm. The government's substantial interest in promoting integration thus meets the third prong of the *Central Hudson* test.

One might argue that prohibiting discriminatory ads actually contributes to racially homogenous housing patterns because allowing people to candidly state preferences may encourage minorities to seek housing where they otherwise might not.<sup>136</sup> If stating preferences is legal, minority applicants may assume that those who do not state such preferences would welcome them.<sup>137</sup> To the contrary, if stating preferences is prohibited and in a predominantly white neighborhood half the roommate seekers are open to minority applicants and half are not, to create a “match,” a minority applicant would have to visit twice as many apartments in that neighborhood.<sup>138</sup> The applicant may not have formal knowledge of those statistics, but over time and talking to others, she may come to suspect it and decide to avoid the white neighborhood, thereby reinforcing the existing housing pattern.<sup>139</sup>

While this model is plausible, the “ifs” are significant. If the percentage of roommate seekers in the white neighborhood who welcome minority applicants is more like 80% or 90%, the number of homes that the applicant would need to visit in order to create a “match” drops considerably, and the stigmatizing effects of discriminatory ads in widely circulated media may reinforce existing housing patterns more than prohibitions do. While it is plausible that if discriminatory ads are allowed, the absence of a stated preference may be turned into a positive, the opposite is equally plausible. Seeing some racist ads may create the impression that prejudice is more widespread than it actually is. Applicants might assume that many more people are racists—particularly people who live in areas with a disproportionate number of discriminatory ads—but do not want to admit their prejudices in print.

Where there are conflicting factual theories, legislatures have latitude in shaping policy. In commercial speech and other First Amendment contexts, the Supreme Court has often deferred to legislative judgments.<sup>140</sup> When the FHA was enacted, Congress decided that even those who are allowed to discrimi-

nate could not publish discriminatory ads related to race, color, religion, or national origin.<sup>141</sup> The same arguments would apply regarding the number of Mrs. Murphy landlords that a minority boarder or renter would need to meet in order to create a “match” and locate housing in a predominantly white neighborhood, but Congress determined that the advertising restrictions were a necessary tool in achieving its integration goals.

The last prong of the *Central Hudson* test is thus satisfied. Although roommate seekers cannot ultimately be forced to live with someone against their will, because racially discriminatory ads stigmatize minority groups in a manner that frustrates integrated housing goals, eliminating such ads from widely accessed public media is a means no more extensive than necessary to further the government's interest in promoting integrated neighborhoods. Thus, as long as *Central Hudson* remains the controlling test for commercial speech,<sup>142</sup> roommate ads that discriminate on the basis of race, ancestry or national origin may be prohibited.

#### B. ADS THAT STATE PREFERENCES RELATED TO OTHER PROTECTED CATEGORIES

It is less clear that barring other types of discriminatory ads, like those expressing preferences based on sexual-orientation or religious practice,<sup>143</sup> passes the *Central Hudson* test. The government has a substantial interest in assuring that all citizens have equal access to housing, but because roommate seekers can ultimately choose their cohabitants, preventing them from advertising their preferences does not make any additional housing available to those with whom they prefer not to live. Whereas the FHA's legislative history is replete with discussions regarding the need to racially integrate housing,<sup>144</sup> its history does not suggest that lawmakers were concerned with integrating housing along other than racial lines.<sup>145</sup> Thus, prohibiting ads stating preferences unrelated to race does not serve the independent legislative objective of integration. These ads do risk creating psychological injury and stigma, but the Supreme Court has held that the government may not restrict speech *only* to prevent such harms. Its decision in *R.A.V. v. City of St. Paul*,<sup>146</sup> striking down an ordinance that made it a misdemeanor to use inflammatory symbols to knowingly arouse “anger, alarm or resentment in others on the basis of race, color, creed, religion or gender,” illustrates that a more tangible interest is required to overcome a First Amendment challenge. Racially discriminatory ads are unique because they frustrate the integration of neighborhoods.

A second reason for applying advertising restrictions to Mrs. Murphy landlords, and to roommate seekers, is that these ads could create a false impression that housing discrimination is legal.<sup>147</sup> People may see ads placed by individuals who are uniquely allowed to discriminate, and mistakenly believe that any landlord may do so.<sup>148</sup> But, while preventing confusion may be a substantial government interest, it can likely be achieved without a total ban. Such a ban would be “more extensive than necessary” because a policy to educate would suffice: Disclaimers explaining that housing discrimination is illegal outside the roommate context could be mandated in any ad stating a discriminatory preference.<sup>149</sup> Restrictions that create a total ban on discriminatory ads unrelated to race, national origin, or ancestry therefore likely fail the fourth step of *Central Hudson*.

### C. ADS THAT USE RELIGION AS A PROXY FOR ETHNICITY

The difficult area is when race, national origin and ancestry categories overlap with religion. In *Saint Francis College v. Al-Khazraji*, Justice Brennan explained “the line between discrimination based on ancestry or ethnic characteristics [] and discrimination based on place or nation of ... origin, [] is not a bright one.”<sup>150</sup> Similarly, for members of some religious groups, like Muslims, Jews, Sikhs and Hindus, membership in the religious group is equated with an ethnic distinction, not simply a distinction based on belief. And, the Civil Rights Act of 1866<sup>151</sup> created protection for Jews against racial discrimination—protection that remains intact.<sup>152</sup> Thus, religious preferences in roommate ads must not be used as a means to skirt the prohibitions on discriminatory ads related to race, national origin, or ancestry. The intense discrimination faced by people identified with Islam since September 11, 2001<sup>153</sup> could eventually drive them into segregated enclaves. And, although some may argue that antireligious statements are too tangential to the government’s interest in promoting integration to fall within the “substantial interest,” all groups who could face discrimination on the basis of race must be treated equally in this context. In *Regents of University of California v. Bakke*, the Supreme Court explicitly rejected the idea that judges are equipped to draw lines as to which groups deserve protection against such discrimination.<sup>154</sup> Although discrimination against certain ethnic groups may have more harmful effects in various circumstances, all are to be afforded equal protection.

How then to discern the prohibited religion-as-ethnicity ads from the permissible religion-as-belief ads? Ads that describe the religious practices that roommate seekers perform within the home—like keeping kosher, prohibiting alcohol for religious reasons, studying the bible, or praying, would suggest that the roommate seeker’s preference for a roommate of a particular religion is related to her belief system: she is not simply using religion as a proxy for ethnicity. Under this approach, an ad that states “no Jews” or “no Muslims” or “no Hindus” would be prohibited. However, a religious roommate seeker looking for

a roommate who keeps kosher or observes Ramadan<sup>155</sup> could state so in her ad. Ads that state “no fundamentalists” or “no Atheists” would also be permissible, because they focus on religious ideology and not ethnicity. The tougher case would be ads that read “no Catholics” or “no Protestants” or “no Christians,” as these religions are not identified with a particular race or ancestry. However, they should nonetheless be prohibited. Otherwise, individuals whose national origin or ethnic group is identified with a particular religion would be granted special rights to discriminate: a result that would probably not survive an equal protection challenge.<sup>156</sup>

### 5. ADDITIONAL PROTECTIONS FOR ADVERTISEMENTS THAT STATE RELIGIOUS PREFERENCES

Homogeneity of tastes, attitudes and orientations help create a successful living arrangement,<sup>157</sup> especially when they

stem from religious beliefs.<sup>158</sup> Because religious practice can overlap with the organization of a household, locating cohabitants who share their faith and practices may be uniquely important for devout roommate seekers. When there are few fellow practitioners in the communities where religious individuals live, the advertising restrictions may make it extremely difficult for devout roommate seekers to locate suitable cohabitants. Several provisions in existing legal doctrine may provide additional grounds for as-applied challenges in these cases.

#### a. RFRAS AND PROTECTIONS UNDER RELIGIOUS EXERCISE CLAUSES

Living with an individual of another faith could seriously burden the religious exercise of some roommate seekers. An Orthodox Jew who maintains a kosher kitchen may be concerned that a roommate who does not share her devotion would compromise her practice—perhaps by eating meat on a plate restricted to dairy.<sup>159</sup> Some Hindus may believe that living with an individual who is not a member of their caste jeopardizes their reincarnation.<sup>160</sup> Restrictions on birthday and holiday celebrations could make cohabitation with people of other faiths a serious burden for a Jehovah’s Witness.<sup>161</sup> In towns or cities with large populations of people practicing their faiths, these roommate seekers could probably locate roommates by placing non-discriminatory ads in places where fellow practitioners congregate.<sup>162</sup> However, when roommate seekers are part of a small minority, the restrictions may prevent them from finding a suitable

cohabitant and therefore pose a serious burden, particularly if they cannot afford to live alone.

The Supreme Court’s decision in *Employment Division, Department of Human Resources of Oregon v. Smith*<sup>163</sup> created an obstacle for such roommate seekers to invoke the free exercise clause of the First Amendment as a defense to fair housing laws. The Court concluded that the clause does not apply to statutes of general applicability that are not directed at religious practice. However, Congress responded by passing the Religious

Freedom Restoration Act of 1993 (RFRA),<sup>164</sup> exempting individuals from generally applicable laws that substantially burden their exercise of religion, unless the government shows the law is the least restrictive means of furthering a compelling government interest. Twelve states have since enacted state RFRAs.<sup>165</sup> The Supreme Court later held that the federal RFRA could not constitutionally restrict state laws,<sup>166</sup> but RFRA’s application to federal laws continues,<sup>167</sup> and state RFRAs continue to apply to state laws. Furthermore, many states apply a compelling interest test similar to the *Sherbert-Yoder*<sup>168</sup> test for infringements on free exercise rights granted by their state constitutions.<sup>169</sup>

State RFRAs or state religious free exercise constitutional provisions are a possible source of protection for devout roommate seekers whose religious practice is substantially burdened by the advertising prohibitions. Religious landlords whose beliefs would be compromised by renting to unmarried cohabitants have sought protection under these provisions. The

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*individuals whose national origin or ethnic group is identified with a particular religion would be granted special rights to discriminate: a result that would probably not survive an equal protection challenge.*

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law remains largely unsettled, but some courts have found merit in the landlords' claims.<sup>170</sup> The California Supreme Court declined to uphold such a landlord's free exercise rights in *Smith v. Fair Housing and Employment Commission (Evelyn Smith)*,<sup>171</sup> but the factors outlined by the court suggest that a burdened roommate seeker could be protected under a RFRA:<sup>172</sup>

(1) The burden must fall on a religious belief rather than a philosophy or a way of life. (2) The burdened religious belief must be sincerely held. (3) The plaintiff must prove the burden is substantial or, in other words, legally significant. (4) If all the foregoing are true, the government must demonstrate that application of the burden to the person is in furtherance of a compelling governmental interest; and is the least restrictive means of furthering that compelling government interest.<sup>173</sup>

Religious roommate seekers likely meet each of the four parts of this test: (1) The housing laws burden religious belief (2) that is sincerely held; (3) the burden is substantial because the laws prevent the devout seeker from locating a roommate who will not interfere with her religious practice; and (4) as described in Part IV.4.b, the government is unlikely to demonstrate that prohibiting ads unrelated to race is a means *no more extensive than necessary* of furthering a compelling state interest. In theory,<sup>174</sup> the *least restrictive means* standard creates an even higher burden on the government.<sup>175</sup> Roommate seekers whose free exercise of religion would be burdened if they were unable to locate a cohabitant would virtually always be describing *their religious practices* (like dietary restrictions, observing the Sabbath, or barring alcohol within their dwelling) in their advertisements. Therefore, the preferences would describe religion in terms of belief, and not as a stigmatizing proxy for ethnicity.<sup>176</sup> Thus, prohibitions on these advertisements would not survive even intermediate scrutiny.<sup>177</sup>

Nonetheless, to raise a RFRA defense, unless a roommate seeker lives in a jurisdiction recognizing an affirmative right to have a roommate, she would need to show that she actually could not afford to live alone – not merely that living alone costs more. The *Evelyn Smith* court explained: “an incidental burden on religious exercise is not substantial if it can be described as simply making religious exercise more expensive.”<sup>178</sup> Given the large number of renters for whom housing costs are categorized as “severe cost burdens,”<sup>179</sup> some roommate seekers are likely to make this showing. Perhaps some could find less desirable housing that required a longer commute or was located in a more dangerous part of town, but denying a renter safe, convenient housing may indeed be held a substantial burden on her religious practice. Thus, RFRA or state free exercise clauses interpreted to follow *Sherbert* and *Yoder* may provide some religious roommate seekers with a defense to generally applicable fair housing laws.

#### B. RIGHTS TO EXPRESSIVE ASSOCIATION

In some cases, roommate seekers are looking for people with whom they can build a religious community for purposes of expressive association. In *Boy Scouts of America v. Dale*, the Supreme Court reaffirmed the First Amendment right “to associ-

ate with others in pursuit of a wide variety of political, social, economic, educational, religious, and cultural ends.”<sup>180</sup> Even when a challenged action is not specifically directed to the freedom of association for free speech purposes, strict scrutiny is applied to infringements on that right.<sup>181</sup> To come within First Amendment protection, a group must engage in some form of public or private expression.<sup>182</sup> The association's aim need not be disseminating a certain message or expressing its views to the public.<sup>183</sup> Expression *within* the community suffices; the association need only engage in expressive activity “that could be impaired in order to be entitled to protection.”<sup>184</sup>

Roommate seekers attempting to create an association for the purpose of communal prayer or bible study would likely be afforded “traditional First Amendment”<sup>185</sup> protection: “We are three Christian females . . . We have weekly bible studies and bi-weekly times of fellowship.”<sup>186</sup> As only a small subset of people who respond to roommate ads would be interested in such a relationship, prohibiting these roommate seekers from advertising specific religious practices could substantially interfere with their ability to identify applicants.<sup>187</sup> As discussed, the government is unlikely to demonstrate a compelling state interest that justifies prohibitions on roommate ads stating preferences unrelated to race even under the less rigorous “no more extensive than necessary” standard.<sup>188</sup> The Supreme Court has rejected the suppression of speech that impairs an association's expressive message on First Amendment grounds.<sup>189</sup> By preventing the creation of the association, restrictions that prevent a roommate seeker from identifying a co-worshipper create just as great an injury to the right of expressive association.<sup>190</sup>

### V. PROHIBITIONS ON DISCRIMINATORY STATEMENTS

The FHA's prohibitions on discriminatory statements make illegal any statement “that indicates any preference, limitation, or discrimination” or indicates “*an intention* to make any such preference, limitation, or discrimination,” if based on a protected characteristic.<sup>191</sup> Courts have consistently interpreted “indicates” to mean indicates “to an ordinary reader” or “to an ordinary listener,” regardless of the speaker's actual intent.<sup>192</sup> Thus, roommate seekers who make statements or ask questions that “an ordinary listener” interprets as indicating an intention to make a preference related to a protected characteristic could be held liable under § 3604(c). Phrases as seemingly innocuous as “religious landmark” or “retired,” and even the word “integrated” are potential sources of liability.<sup>193</sup> Inquiries about issues like religion<sup>194</sup> or, in jurisdictions where it is protected, sexual orientation, are prohibited. A roommate seeker could be found in violation of the law for describing her own religious practices or sexual orientation, if it would seem to “an ordinary listener” that the statements indicate a discriminatory preference. The restrictions thus effectively create a category of taboo subjects that people who are considering living together may not discuss without risking liability.

#### 1. INTIMATE ASSOCIATION AND PRIVACY RIGHTS AND DISCRIMINATORY STATEMENTS

Limiting the subjects that potential cohabitants can discuss may substantially burden roommate seekers' ability to create successful roommate relationships and to feel comfortable in their homes. For example, the restrictions could adversely affect an Orthodox Jew who observes Shabbat<sup>195</sup> and must as-

certain that her future roommate will not interfere with her practice. So too for the devout Muslim who prays in the living room – the only room in the apartment with an Eastward facing window – several times a day, or the Evangelical Christian who holds weekly bible studies around the kitchen table. These individuals would want to confirm that a roommate will not interrupt their worship by turning on a television or stereo in their common space while they are deep in prayer or study. Disclosure of these practices also serves applicants' interests. An applicant who wants to watch *Oprah* may be annoyed if her roommate commandeers the living room for prayer, just as an applicant who does not participate in bible study may resent lost access to her kitchen each week. Because it is likely that tensions would later arise as a result of these undisclosed competing desires, a devout roommate seeker could be significantly burdened if unable to discuss her religious practice with a potential cohabitant. The statement prohibitions thus directly and substantially prevent her from establishing a workable roommate relationship, and therefore violate her intimate association rights.

Privacy rights are similarly infringed. If an evangelical Christian who truly believes that homosexuality is a sin winds up with a lesbian roommate because she was unable to determine an applicant's orientation prospectively, greeting her roommate's lover in the bathroom several mornings a week may make her acutely aware that behavior that violates her belief system is occurring within her home. The result may be feelings of alienation in "the one retreat to which men and women [are supposed to be able to] repair to escape the tribulations of their daily pursuits."<sup>196</sup> If an individual cannot exercise enough control over the composition of her household to create an environment in which she feels at ease, the right to privacy seems little more than a platitude. Therefore, under such circumstances, statement prohibitions would likely violate the test outlined in *Carey v. Population Services, International*. Just as limiting the distribution of contraceptives to licensed pharmacists "burden[ed] an individual's right to decide to prevent conception or terminate pregnancy by substantially limiting access to the means of effectuating that decision,"<sup>197</sup> statement prohibitions that prevent a roommate seeker from talking about critical aspects of her personal life or from asking a candidate about matters of great importance to her, substantially limit her ability to effectively select future roommates.

Unlike advertising prohibitions, statement prohibitions actually prevent a roommate seeker from finding a compatible cohabitant. That is, a roommate seeker who is religious, has strong feelings about homosexuality or politics,<sup>198</sup> or cares about national origin or race but cannot discern an applicant's ancestry by looking at her, would be unable to find a suitable cohabitant. Unlike advertising prohibitions, which increase the size of the applicant pool that a roommate seeker must consider, but do not "directly and substantially" interfere with the right to form an intimate association or unduly burden privacy, statement prohibitions may make it impossible for a roommate seeker to determine that an applicant is someone with whom she wants to form an intimate association—someone to whom she will reveal her "backstage" self.<sup>199</sup> Thus, they do "directly and substantially" interfere with her right to intimate association and create an "undue burden" on her privacy rights.

## 2. FREE SPEECH RIGHTS AND STATEMENT PROHIBITIONS

Prohibitions on discriminatory statements unrelated to race, national origin or ancestry do not require new analysis. Even if statements made during the interview process are considered commercial speech, prohibitions on such statements fail the *Central Hudson* test just as prohibitions on parallel advertisements fail because the government is unlikely to establish that such restrictions are no more extensive than necessary to further a substantial government interest.

However, prohibitions on discriminatory statements related to race, national origin or ancestry require a fresh look. The government maintains its interest in integration, but statements made in private are unlikely to undermine this objective and contribute to the stigmatization of minority groups to the extent that widely circulated ads do. The risk remains that individuals subjected to offensive statements may no longer consider a roommate of another race<sup>200</sup> or may restrict their search to neighborhoods primarily inhabited by members of their own race. Nonetheless, statements made in private will not be seen by potentially thousands of people and

thus do not contribute to the stigmatization of minority groups in the way that widely distributed advertisements do. Because the connection to the government's integration objectives is more tenuous, these prohibitions may not pass even the intermediate scrutiny applied to restrictions on commercial speech.

Furthermore, whether these statements should even be classified as commercial speech is less clear. Once prospective cohabitants are identified and roommate seekers and applicants are determining whether they will be compatible, their dialogue may be considered speech afforded full First Amendment protection and restrictions upon it subjected to strict scrutiny. This dialogue cannot be characterized as an advertisement, and although it relates to a commercial transaction—the rental of housing for financial gain—the Supreme Court has explained that speech does not retain its commercial character "when it is inextricably intertwined with otherwise protected speech."<sup>201</sup> Because locating suitable applicants does not require the vast majority of roommate seekers to include discriminatory preferences when they are placing ads, such statements are not "inextricable" in the advertising context. But, there is nothing commercial about a roommate seeker explaining that she wants a roommate who will join her in communal prayer, and she is unlikely to find such a cohabitant if unable to discuss religion when interviewing applicants. As it cannot be extracted from the speech related to the commercial transaction, this speech should retain its full First Amendment protections.

Therefore, the government cannot regulate the statements made when roommate seekers interview applicants, at least those related to determining compatibility. Outside the commercial speech realm, "content-based restrictions are sustained only in the most extraordinary circumstances: 'The First Amendment forbids the government from regulating speech in ways that favor some viewpoints or ideas at the expense of others.'"<sup>202</sup> In *R.A.V. v. City of St. Paul*,<sup>203</sup> the Court concluded that prohibiting the use of inflammatory symbols was unconstitutional despite its "belief that burning a cross in someone's front

*a devout roommate seeker could be significantly burdened if unable to discuss her religious practice with a potential cohabitant.*

yard [was] reprehensible.”<sup>204</sup> Unless the government can show that prohibitions on discriminatory statements made when roommate seekers are interviewing applicants serve a compelling interest—apart from protecting applicants from exposure to reprehensible ideas<sup>205</sup>—the restrictions also violate the First Amendment.

A determination that the government can prohibit racially discriminatory ads, but not statements between individuals, risks a counterproductive result. Roommate applicants who respond to non-discriminatory ads could then be subjected to offensive statements in a more inimical form, such as those spoken to them directly. However, scholars analyzing prejudice and discrimination in cyberspace suggest that because explicit expressions of prejudice have become taboo, people are significantly less likely to explicitly deny someone a resource or service based on discriminatory criteria when interacting with another person in real time.<sup>206</sup> Rather, they will find a non-explicit excuse for behaving discriminatorily.<sup>207</sup>

Prejudice is more likely to be overtly expressed on the Internet because of the anonymous and disinhibited nature of the forum,<sup>208</sup> where people feel free to express themselves in less self-conscious and less socially desirable ways.<sup>209</sup> One example of this phenomenon is cyberbullying. As explained by a teenager whose friend committed suicide after being harassed by his classmates on-line, “You wouldn’t do that to someone’s face, but on-line it’s completely different. You can do whatever you want and no one can do anything—you’re at your house they’re at their house—it’s different.”<sup>210</sup>

Roommate seekers are more likely to be discreet when dealing with applicants in person than when placing Internet or classified ads. In most of the cases discussed in Part II, the roommate seekers rarely spoke of their own prejudices to the complainants; rather, they either claimed that another roommate had a problem with the candidate, made the statement to a third party, or otherwise diffused their remarks. In *Larrick*, the defendant told the applicant that her *other* roommate did not want to live with a black person.<sup>211</sup> In *Baker*, the respondent explained, via voicemail, that it was his fundamentalist Christian roommate with whom the lesbian applicant “would not get along.”<sup>212</sup> In *DeSantis*, the respondent told the *white* tester that she was afraid of black men.<sup>213</sup> In *Marya v. Slakey*, the roommate who rejected the applicant did not make per se insulting remarks about Indians, instead claiming that he feared a third Indian roommate would create an environment dominated by a single culture.<sup>214</sup> While the statements made in each case vary in degree of offensiveness, the speakers were somewhat sheepish about making them. They may have made more overtly prejudiced statements in an anonymous advertisement. Thus, prohibiting discrimina-

tory ads, even while permitting discriminatory statements, may indeed shield applicants from the most pernicious speech.

## VI. CONCLUSION

Whether it is for months or years, an individual’s choice to allow someone to share her living space is a private decision. The government cannot interfere with the individual’s ultimate selection without violating her Fourteenth Amendment rights. This is no less true when an individual takes a roommate in order to defray housing costs. A conclusion to the contrary would mean that those with fewer resources have lesser rights to intimate association and privacy. Such an outcome runs counter to the Supreme Court’s conclusion in *Zablocki v. Redhail*<sup>215</sup> that people may not be deprived of their fundamental rights of association simply because they are poor.

The more information that a roommate seeker can place in an advertisement—about herself and about what she desires in a roommate—the less time she will spend interviewing unsuitable candidates. Descriptive ads also save applicants the time and energy they would otherwise expend contacting people who are unlikely to accept them. Therefore, both sides benefit when roommate seekers are granted more leeway in advertising their preferences. Nonetheless, there is a tipping point at which the harm that an advertised preference causes outweighs the benefits of targeted advertising. By stigmatizing minority groups, racially discriminatory ads perpetuate racially homogenous housing patterns and the resulting social harms. Although ultimately a roommate seeker can rely on any characteristic in choosing a cohabitant, saving some time is not worth the damage caused by racially discriminatory ads. Furthermore, unlike preferences motivated by practical or religious concerns, like keeping a kosher kitchen, because preferences related to race are often motivated by fear of the unknown, intergroup contact during an interview may cause some roommate seekers to reevaluate their prejudices.<sup>216</sup>

Fair housing laws should thus balance these competing interests. I urge legislatures to recognize the intimate association and privacy concerns that roommate seekers face when choosing those with whom they will negotiate taking out the garbage, cleaning the bathtub, and whether to set up a Christmas tree in the living room. Because these issues are not encountered by either traditional or most Mrs. Murphy landlords, fair housing laws should be amended to address the special considerations of roommate seekers, but the integration goals of the FHA should not be sacrificed.

**The Modern American is available on  
the Westlaw, LexisNexis, and V.lex databases.**

\*J.D. Candidate UCLA School of Law, 2009; B.S., Northwestern University, 1992. I owe special thanks to Eugene Volokh for his advice, critique, and encouragement over many drafts of this article. I also thank Andrew Lim and the staff at The Modern American.

<sup>1</sup> This ad was posted at Roommates.com, as described in *Fair Housing Council of San Fernando Valley v. Roommates.com, LLC*, 489 F.3d 921, 929 n.11 (9th Cir. 2007), (*reh'g granted*).

<sup>2</sup> *Id.* at 930 n.1 (Reinhardt, J., concurring) (court's emphasis).

<sup>3</sup> *Id.* at 930 n.2 (Reinhardt, J., concurring) (court's emphasis).

<sup>4</sup> See, e.g., CONN GEN. STAT. ANN. § 46a-81(e) (West 2005).

<sup>5</sup> Senator George D. Aiken of Vermont created this moniker, suggesting that Congress "integrate the Waldorf and other large hotels, but permit the 'Mrs. Murphy landlords,' who run small rooming houses all over the country, to rent their rooms to those they choose." James D. Walsh, Note, *Reaching Mrs. Murphy: A Call for the Repeal of the Mrs. Murphy Exemption to the Fair Housing Act*, 34 HARV. C.R.-C.L. L. REV. 605, 605 n.3 (1999).

<sup>6</sup> See 42 USCA §§ 3603(b)(2), 3604(c) (West 2003).

<sup>7</sup> In California, a single tenant seeking a roommate may discriminate, but two tenants seeking a third may not. In such cases discrimination—not just discriminatory statements or ads—is banned outright. Its law exempts "Refusal to rent or lease a portion of an owner-occupied single-family house . . . provided that no more than one roomer or boarder is to live within the household, and the owner complies with subdivision (c) of Section 12955, which prohibits discriminatory notices, statements, and advertisements." CAL. GOV'T. CODE § 12927(2)(A) (West 2003).

<sup>8</sup> 42 U.S.C. §§ 1981-1982 (2001).

<sup>9</sup> See Robert G. Schwemm, *Discriminatory Housing Statements and § 3604(c): A New Look at the Fair Housing Act's Most Intriguing Provision*, 29 FORDHAM URB. L.J. 187, 221 n.150 (2001).

<sup>10</sup> See *id.* at 221 n.152 (citing *Bill v. Hodges*, 628 F.2d 844, 845 n.1 (4th Cir. 1980)); *Morris v. Cizek*, 503 F.2d 1303, 1304 (7th Cir. 1974); *Johnson v. Zarembo*, 381 F. Supp. 165, 166 (N.D. Ill. 1973)).

<sup>11</sup> In the 2000 census, 4,536,460 people identified themselves as a "housemate or roommate" versus 2,238,177 who identified themselves as a "roomer, boarder or foster child." Household Relationship and Group Population: 2000, Data Set: Census 2000 Summary File 1, 100% Data, Geographic Area: United States, available at [http://factfinder.census.gov/servlet/QTTable?\\_bm=y&-geo\\_id=01000US&-qr\\_name=DEC\\_2000\\_SF1\\_U\\_QTP11&-ds\\_name=DEC\\_2000\\_SF1\\_U](http://factfinder.census.gov/servlet/QTTable?_bm=y&-geo_id=01000US&-qr_name=DEC_2000_SF1_U_QTP11&-ds_name=DEC_2000_SF1_U) (last visited Aug. 25, 2008).

<sup>12</sup> See *Dept. of Fair Employment & Hous. v. Young*, No. H 9900 Q-0256-00-SH, 2003 CAFEHC LEXIS 14, \*7-8 (describing a boarding house owner who imposed strict rules on his tenants—regulating the hours that they could use facilities, charging them \$6 per night for overnight guests, and requiring that they wear indoor footwear inside the house).

<sup>13</sup> The California Department of Fair Employment and Housing heard four of the cases. Under the California Constitution, an administrative agency may not declare a statute unenforceable based on unconstitutionality unless an appellate court has made such a determination. See CAL. CONST. art. III, § 3.5. However, several commissioners expressed concerns regarding the constitutionality of applying fair housing laws in the roommate context. In *Department of Fair Employment & Housing v. Larrick*, three concurring commissioners questioned whether following the law as it currently exists violated the defendants' intimate association and privacy rights and urged the legislature to revisit the issue. No. H 95-96 Q-0510-02, 1998 CAFEHC LEXIS 15 at \*26; See also *Dep't of Fair Employment & Hous. v. DeSantis*, No. 02-12, 2002 WL 1313078 (Cal.F.E.H.C.) at \*9 n.1 ("This case raises significant issues of the constitutional protections of freedom of speech and the right to privacy and association").

<sup>14</sup> *Larrick*, 1998 CAFEHC LEXIS 15.

<sup>15</sup> *Id.* at \*5-6.

<sup>16</sup> The respondents were ordered to pay the complainant's \$744.35 in expenses, \$2,000 in compensatory damages for emotional distress, and the woman who made the statement was charged a civil penalty of \$500. *Id.* at \*18-23.

<sup>17</sup> See CAL. GOV'T CODE ANN. § 12927(2)(A), *supra* note 7. No exemptions permit discriminatory statements under any circumstances.

<sup>18</sup> *Marya v. Slakey*, 190 F. Supp. 2d 95 (D. Mass. 2001).

<sup>19</sup> *Id.* at 99.

<sup>20</sup> *Id.*

<sup>21</sup> The court determined that there was sufficient evidence from which a jury could conclude that the defendant had violated both the FHA and the Civil Rights Act of 1866, 42 U.S.C. §§ 1981-1982 (2001); 190 F. Supp. 2d at 102.

<sup>22</sup> *Sprague v. City of Madison*, No. 94-2983, 1996 WL 544099 (Wis. Ct. App. Sept. 26, 1996).

<sup>23</sup> *Id.* at \*3.

<sup>24</sup> *Id.* at \*1 n.1. The ordinance was amended to include §3.23 (c): "Nothing in this ordinance shall affect any person's decision to share occupancy of a lodging room, apartment or dwelling unit with another person or persons."

<sup>25</sup> Litigation cost \$3300 paid to the plaintiff and \$23,000 in attorneys' fees. See Posting of Eugene Volokh to [http://volokh.com/archives/archive\\_2007\\_05\\_13-2007\\_05\\_19.shtml#1179259134](http://volokh.com/archives/archive_2007_05_13-2007_05_19.shtml#1179259134) (May 15, 2007, at 15:58 PST).

<sup>26</sup> *Dep't of Fair Employment & Hous. v. DeSantis*, No. 02-12, 2002 WL 1313078 \*2 (Cal.F.E.H.C.).

<sup>27</sup> *Id.*

<sup>28</sup> She was ordered to pay \$240 in lost wages because the complainant missed work to attend the hearing, \$500 for emotional distress, and was ordered to attend four hours of training on discrimination under the FHA. *Dep't of Fair Employment & Hous. v. DeSantis*, No. 02-12, 2002 WL 1313078 \*8 (Cal.F.E.H.C.).

<sup>29</sup> *Fair Hous. Advocates Ass'n v. McGlynn*, No. 7979, 1999 Ohio Civil Rights Comm. LEXIS 10.

<sup>30</sup> *Id.* at \*5.

<sup>31</sup> *Id.* at \*6.

<sup>32</sup> *Id.*

<sup>33</sup> *Id.* at \*6.

<sup>34</sup> *Id.*

<sup>35</sup> *Id.* at \*11.

<sup>36</sup> *Dep't. of Fair Employment & Hous. v. Baker*, No. H 97-98 Q-0649-00gu, 1999 CAFEHC LEXIS 14.

<sup>37</sup> *Id.* at \*4.

<sup>38</sup> CAL. CIV. CODE § 51(b)(West 2007): "All persons within the jurisdiction of this state are free and equal, and no matter what their . . . sexual orientation are entitled to the full and equal accommodations, advantages, facilities, privileges, or services in all business establishments of every kind whatsoever."

<sup>39</sup> *Baker*, 1999 CAFEHC LEXIS 14 at \*9-10.

<sup>40</sup> *Id.* at \*12 (citations omitted).

<sup>41</sup> *Id.* at \*13 (citations omitted).

<sup>42</sup> *Id.* at \*16-17.

<sup>43</sup> Chi. Lawyers' Comm. for Civil Rights Under the Law, Inc. v. Craigslist, Inc., 461 F. Supp. 2d 681 (N.D. Ill. 2006), *aff'd* Chi. Lawyers' Comm. for Civil Rights Under the Law, Inc. v. Craigslist, Inc., 519 F.3d 666 (7th Cir. 2008).

<sup>44</sup> *Id.* at 685.

<sup>45</sup> *Id.* at 685-86. Ads posted included: "African Americans and Arabians tend to clash with me . . ."; "Christian single straight female needed."; and "looking for gay latino."

<sup>46</sup> 47 U.S.C. § 230 (2001).

<sup>47</sup> 461 F. Supp. 2d at 698.

<sup>48</sup> 519 F.3d at 668.

<sup>49</sup> *Fair Hous. Council of San Fernando Valley v. Roommates.com, LLC*, 521 F.3d 1157 (9th Cir. 2008) (*en banc*).

<sup>50</sup> *Id.* at -1165.

<sup>51</sup> *Id.* at 1166.

<sup>52</sup> *Id.* at 1164.

<sup>53</sup> *Roberts v. Jaycees*, 468 U.S. 609, 618-19 (1984).

<sup>54</sup> *Id.* at 619-20 (emphasis added).

<sup>55</sup> See generally ERVING GOFFMAN, *THE PRESENTATION OF SELF IN EVERYDAY LIFE* (Doubleday Anchor Books 1959). Goffman uses theater imagery to describe the mechanisms used to protect individuals' public personas: "Since the vital secrets of a show are visible backstage and since performers behave out of character while there, it is natural to expect that the passage from the front region to the back region will be kept closed to members of the audience or that the entire back region will be kept hidden from them." *Id.* at 113. He emphasizes that people suspend performances among their intimates: "[T]he surest sign of backstage solidarity is to feel that it is safe to lapse into an associable mood of sullen, silent irritability." *Id.* at 132.

<sup>56</sup> GLENN C. LOURY, *THE ANATOMY OF RACIAL INEQUALITY* 95, 96 (Harvard Univ. Press) (2002).

<sup>57</sup> See *cf.* *City of Ladue v. Gilleo*, 512 U.S. 43, 52 (1994) (explaining that the government's willingness to exempt some individuals from generally applicable laws "may diminish the credibility of the government's rationale for restricting speech in the first place").

<sup>58</sup> *Village of Belle Terre v. Boraas*, 416 U.S. 1 (1974).

<sup>59</sup> See William P. Marshall, *Discrimination and the Right of Association*, 81 NW. U. L. REV. 68, 81 (1986) (citing *Belle Terre* for the proposition that roommate relations raise "no protectable associational interest."); Lucy R. Dollens, *Artificial Insemination: Right of Privacy and the Difficulty in Maintaining Donor Anonymity*, 35 IND. L. REV. 213, fn 62 (2001) (no right of privacy in roommate decisions).



<sup>60</sup> The Eleventh Circuit hypothesized that such an affirmative requirement would be constitutionally problematic in *Senior Civil Liberties Ass'n v. Kemp*, 965 F.2d 1030 (11th Cir. 1992). A couple who lived in a condominium complex that excluded children under the age of sixteen alleged that the 1988 addition of "familial status" to the classes protected by the FHA violated their privacy and association rights. While the court rejected their claims because the law only dictated who their neighbors might be, it nonetheless stated that their privacy claim might be different "[i]f the Act were trying to force plaintiffs to take children into their home." *Id.* at 1036 (emphasis added).

<sup>61</sup> *Carey v. Brown*, 447 U.S. 455, 471 (1980).

<sup>62</sup> *Id.*

<sup>63</sup> *Id.*

<sup>64</sup> See *Frisby v. Schultz*, 487 U.S. 474, 484-85 (1988) (holding that a ban prohibiting picking outside a particular residence was narrowly tailored to protect residential privacy and did not violate the First Amendment).

<sup>65</sup> See *Stanley v. Georgia*, 394 U.S. 557, 564 (1969) (upholding the right to have obscene material in one's own home: "For also fundamental is the right to be free, except in very limited circumstances, from unwanted governmental intrusions into one's privacy"); *Lawrence v. Texas*, 539 U.S. 558, 562 (2003) (upholding the right to practice sodomy in one's own home: "Liberty protects the person from unwarranted government intrusions into a dwelling or other private places").

<sup>66</sup> See the privacy clauses in the constitutions of Alaska, Arizona, California, Florida, Hawaii, Louisiana, Montana, South Carolina, and Washington. ARK. CONST. art. 1, § 22; ARIZ. CONST. ART. 2 § 8; CAL. CONST. art. 1, § 1; FLA. CONST. art. 1 § 23; HAW. CONST. art. 1 § 6; LA. CONST. ART. 1, § 5; MO. CONST. art. 2, § 10; S.C. CONST. art. 1, § 10; WASH. CONST. art. 1, § 7.

<sup>67</sup> *City of Santa Barbara v. Adamson*, 27 Cal.3d 123 (1980).

<sup>68</sup> This article focuses on California as one example of a state that offers broader privacy protections under its state constitution than are afforded federally. Additionally, these questions have arisen frequently in cases adjudicated by California's Department of Fair Employment and Housing. See *supra* notes 12, 13, 26 and 36.

<sup>69</sup> Appellants were twelve adults in their 20's and 30's occupying a ten bedroom, six bathroom house. *City of Santa Barbara* 27 Cal.3d at 127.

<sup>70</sup> *Id.* at 127-28.

<sup>71</sup> Citing fair housing laws, the court did state: "Owners with aims like those of Ms. Adamson are, of course, subject to many restrictions applicable to lessors generally. . . ." *Id.* at 134 n.4. However, as discussed in *Young*, 2003 CAFEHC LEXIS 14, the court was not reviewing the applicability of the fair housing laws to roommate seekers, and thus this statement is non-binding dictum.

<sup>72</sup> See *State v. Baker*, 81 N.J. 99, 104, 114 n.10 (N.J. 1979) (Zoning restriction preventing two families from living in a single household—where they ate together, shared common areas and held communal prayer sessions—violated state constitutional due process and privacy rights); *McMinn v. Town of Oyster Bay*, 66 N.Y.2d 544, 552 (N.Y. 1985) (Zoning ordinance restricting single-family housing to persons related by blood, marriage or adoption, or to two people who do not share this relationship but are 62 or older, violated the due process protections embodied in New York's constitution).

<sup>73</sup> *Hill v. Nat'l Collegiate Athletic Assn.*, 7 Cal. 4th 1, 39-40 (1994).

<sup>74</sup> *Id.* at 39-40.

<sup>75</sup> *Id.*

<sup>76</sup> *Tom v. City & County of San Francisco*, 120 Cal. App. 4th 674 (2004).

<sup>77</sup> *Id.* at 678.

<sup>78</sup> *Id.* at 687.

<sup>79</sup> See *id.*

<sup>80</sup> *Montgomery v. Carr*, 101 F.3d 1117 (6th Cir. 1996).

<sup>81</sup> See *id.* (Public school's policy forbidding married teachers from working at the same school did not directly and substantially interfere with the ability to choose one's mate even though it added sixty-five miles to a couple's commute); *Parks v. City of Warner Robins, Ga.*, 43 F.3d 609, 616 (11th Cir. 1995) (city government's anti-nepotism policy upheld even though some people might be forced to leave their jobs, because it was "unlikely that the policy [would] actually prevent couples from marrying").

<sup>82</sup> *Zablocki v. Redhail*, 434 U.S. 374 (1978).

<sup>83</sup> *Id.* at 387.

<sup>84</sup> *Id.* at 388.

<sup>85</sup> *Califano v. Jobst*, 434 U.S. 47, 58 (1977).

<sup>86</sup> *Montgomery*, 101 F.3d at 1125.

<sup>87</sup> *Id.* at 1128.

<sup>88</sup> Kathleen F. Sullivan, *Unconstitutional Conditions*, 102 HARV. L. REV. 1413, 1415 (1989).

<sup>89</sup> *Id.* at 1416.

<sup>90</sup> *Id.* at 1436-37.

<sup>91</sup> *Id.* at 1437 (citing *Lyng v. Castillo*, 477 U.S. 635 (1986)); *Id.* at 1439 (citing *Lyng v. Int'l Union, UAW*, 485 U.S. 360 (1988)).

<sup>92</sup> *Id.* at 1438 (citations omitted).

<sup>93</sup> See *U.S. v. Booker*, 543 U.S. 220, 274 (2005); see also *N.Y. State Club Ass'n, Inc. v. City of N.Y.*, 487 U.S. 1, 11 (1988) (rejecting a facial challenge to application of New York's antidiscrimination law to private clubs: "Although there may be clubs that would be entitled to constitutional protection. . . surely it cannot be said that [the law] is invalid on its face because it infringes the private associational rights of each and every club covered by it").

<sup>94</sup> Additional protections for religious roommate seekers are discussed in Part IV 5.

<sup>95</sup> *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 886 (1992); see also *Gonzalez v. Carhart*, 127 S. Ct. 1610, 1636 (2007) (upholding a ban on intact dilation and evacuation with no exception to protect the mother's health, despite disagreement in the medical community regarding its health consequences). In *City of Akron v. Akron Ctr. for Reprod. Health, Inc.*, 462 U.S. 416, 434-35, nn.20-21 (1983) (overruled on other grounds), the Court did strike down a restriction requiring second-trimester abortions to be performed in hospitals because the requirement could "significantly limit a woman's ability to obtain an abortion." Forcing women to travel increased both expenses and health risks. The court emphasized that the situation in Akron was "not unique"—in many areas of the country "few, if any, hospitals perform second-trimester abortions." Thus, *Akron* is not in conflict with cases that set a high bar for the undue burden test: The law under review required women to get second-trimester abortions in places that rarely provided them.

<sup>96</sup> 505 U.S. at 886.

<sup>97</sup> *Carey v. Population Servs. Int'l*, 431 U.S. 678 (1977).

<sup>98</sup> *Id.* at 689 (citing *Eisenstadt v. Baird*, 405 U.S. 438, 461-64 (1972) (White, J. concurring)).

<sup>99</sup> *Id.*

<sup>100</sup> Even in 2007, over 330 towns in New York have fewer than 1000 residents. See *City-Data.com*, New York Very Small Towns and Villages, <http://www.city-data.com/city/New-York3.html> (last visited Nov. 2, 2008).

<sup>101</sup> 431 U.S. at 689 n. 5 (1977) (quoting 431 U.S. 678, 703-704) (Powell, J. concurring).

<sup>102</sup> *Hill*, 7 Cal. 4th 1 at 39-40.

<sup>103</sup> See *supra* Part IV 1.

<sup>104</sup> On November 2, 2008, the following ad was posted in the New York Times personals on line: "...Lovely, intelligent, poet/ professor with good bones would like to meet an intelligent, compassionate, witty man for dinner, theater opera. Turn-ons include availability, British Accents, Israel lovers, singers, world travelers, left-leaning liberal of human white activist's, cat lovers, late sleepers, sun/ beach worshipers, Jews, yiddish speakers, interesting story tellers, writers, Stop-pard lovers. . . ." Advertisement 12, <http://query.nytimes.com/gst/personals.html?pqquery=&cat=All&submit2.x=10> (last visited Nov. 2, 2008).

<sup>105</sup> Advertising prohibitions modeled after those in the fair housing context would prevent an individual looking for a mate from describing herself, as well as from describing the characteristics she sought in a partner. Thus, an individual would be prevented from listing her own race, religion, age or, in some jurisdictions, sexual orientation, in her ad, increasing the possibility that she would face rejection during the "interview."

<sup>106</sup> See *Bates v. State Bar of Arizona*, 433 U.S. 350, 363 (1977).

<sup>107</sup> *Id.* at 364.

<sup>108</sup> *Id.*

<sup>109</sup> See *Bigelow v. Virginia*, 421 U.S. 809, 826 (1975) (overturning the Virginia Supreme Court's decision that ads for New York abortion clinics in Virginia newspapers received no First Amendment protection, but indicating that the state can regulate advertising to some extent so long as it may legitimately regulate the underlying activity).

<sup>110</sup> See *DeSantis*, 2002 WL 1313078 at \*2, (looking for a roommate "to help pay the rent"); *Dep't of Fair Employment & Hous. v. Larrick*, No. H 95-96 Q-0510-02, 1998 CAFEHC LEXIS 15 at \*5-6, (looking for a third person "to share their unit and help pay the rent").

<sup>111</sup> See *Riley v. Nat'l Fed'n of the Blind of N.C.*, 487 U.S. 781, 796 (1988) (holding that disclosures regarding the profits of professional solicitors, required before charitable contributions could be requested, were inextricably related to fully protected speech and thus could not be "parceled out" and treated as commercial speech). This is discussed in Part V 2, when prohibitions on discriminatory statements are contrasted with prohibitions on discriminatory advertisements.

<sup>112</sup> *Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n*, 477 U.S. 557 (1980). Several justices expressed dissatisfaction with the *Central Hudson* test in *44 Liquormart, Inc. v. Rhode Island*, 517 U.S. 484 (1996) but the test remains good law. See *Thompson v. W. States Med. Ctr.*, 535 U.S. 357, 367-68 (2002)

(plurality opinion); *Anderson v. Treadwell*, 294 F.3d 453, 460, 461 (2d. Cir. 2002); *Passions Video, Inc. v. Nixon*, 458 F.3d 837, 841 (8th Cir. 2006); *Allstate Ins. Co. v. Abbott*, 495 F.3d 151, 168 (5th Cir. 2007).  
<sup>113</sup> 477 U.S. at 566.

<sup>114</sup> In *Bd. of Trs., State Univ. of N.Y. v. Fox*, 492 U.S. 469, 477 (1989), the Court declined to impose a “least-restrictive-means requirement.” It explained that its decision “take[s] account of the difficulty of establishing with precision the point at which restrictions become more extensive than their objective requires, and provide[s] the Legislative and Executive Branches needed leeway in a field (commercial speech) ‘traditionally subject to governmental regulation.’” *Id.* at 481 (citations omitted).

<sup>115</sup> See *Trafficante v. Metro. Life Ins. Co.*, 409 U.S. 205 (1972). The Court examined the FHA’s legislative history and quoted a statement by Senator Mondale, who drafted the legislation, explaining that the “proposed law was to replace ghettos ‘by truly integrated and balanced living patterns.’” *Id.* at 211 (citing 114 Cong. Rec. 3422).

<sup>116</sup> *Parents Involved in Community Schools v. Seattle School District No. 1*, 127 S. Ct. 2738 (2007), in which the Supreme Court reviewed efforts by public schools “to address the effects of racially identifiable housing patterns on school assignments,” *id.* at 2747, illustrates both that integration remains an elusive goal and the broader repercussions of racially homogenous neighborhoods.

<sup>117</sup> *Linmark Assocs., Inc. v. Willingboro*, 431 U.S. 85 (1977).

<sup>118</sup> The Court determined that a ban on “For Sale” signs left homeowners with no satisfactory means to sell their houses. *Id.* at 92-94.

<sup>119</sup> *Id.* at 87-88.

<sup>120</sup> The Court stated: “The Council has sought to restrict the free flow of these data because it fears that otherwise homeowners will make decisions inimical to what the Council views as the homeowners’ self-interest. . . .” *Id.* at 96. It continued:

“There is . . . an alternative to this highly paternalistic approach. That alternative is to assume that this information is not in itself harmful, that people will perceive their own best interests if only they are well enough informed, and that the best means to that end is to open the channels of communication rather than to close them. . . .”

*Id.* at 97 (quoting *Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc.*, 425 U.S. 748, 770 (1976)).

<sup>121</sup> *Florida Bar v. Went For It, Inc.*, 515 U.S. 618 (1995).

<sup>122</sup> *Id.* at 625-627.

<sup>123</sup> *Bolger v. Youngs Drugs Prod. Corp.*, 463 U.S. 60 (1983).

<sup>124</sup> 515 U.S. at 631.

<sup>125</sup> The bi-racial complainant in *Dep’t of Fair Employment & Housing v. Larrick* who was subjected to a racist statement during a telephone conversation described her reaction as “angry and hurt,” stating that she “felt as though there had been no progress in race relations.” *Dep’t of Fair Employment & Hous. v. Larrick*, No. H 95-96 Q-0510-02, 1998 CAFEHC LEXIS 15, \*8. And, research has shown that exposure to prejudice increases the occurrence of depression, anxiety, and other negative health consequences on people “who perceive high levels of discrimination.” Devah Pager, *The Dynamics of Discrimination*, Nat’l Poverty Center Working Paper Series #06-11 at 4 (June, 2006) (citing Ronald C. Kessler, Kristin D. Mickelson, & David R. Williams, *The Prevalence, Distribution, and Mental Health Correlates of Perceived Discrimination in the United States*, J. OF HEALTH & SOC. BEHAV. 40(3), 208-230 (1990)).

<sup>126</sup> *United States v. Hunter*, 459 F.2d 205, 213 (4th Cir. 1972).

<sup>127</sup> *Id.* at 214.

<sup>128</sup> *Id.* at 215.

<sup>129</sup> GLENN C. LOURY, *THE ANATOMY OF RACIAL INEQUALITY* 95-96 (Harvard Univ. Press) (2002).

<sup>130</sup> *Id.* at 99.

<sup>131</sup> *Id.* at 96.

<sup>132</sup> *Id.* at 100-01.

<sup>133</sup> *Id.* at 90-91 (citing Camille Zubrinsky Charles, *Neighborhood Racial-Composition Preferences: Evidenced from a Multiethnic Metropolis*, 47 SOC. PROBS. 379, 386 (2000)).

<sup>134</sup> *Id.*

<sup>135</sup> *Id.* at 90.

<sup>136</sup> Comments on an earlier draft of this article from Eugene Volokh, UCLA Professor of Law, given Nov. 7, 2007.

<sup>137</sup> *Id.*

<sup>138</sup> *Id.*

<sup>139</sup> *Id.*

<sup>140</sup> See *Metromedia, Inc. v. City of San Diego*, 453 U.S. 490, 507-508 (1981) (upholding billboard ban “despite the meager record” showing a connection between billboards and traffic safety); *City of Renton v. Playtime Theaters, Inc.*, 475 U.S. 41, 50-52 (upholding ordinance which prohibited adult theaters: “The

First Amendment does not require a city . . . to conduct new studies or produce [independent] evidence. . . so long as whatever evidence the city relies upon is reasonably believed to be relevant to the problem that the city addresses”) (emphasis added); *Florida Bar v. Went For It, Inc.*, 515 U.S. 618, 628 (1995) (“We do not read our case law to require that empirical data come to us accompanied by a surfeit of background information”). But see *44 Liquormart, Inc. v. Rhode Island*, 517 U.S. 484, 505 (1996) (plurality opinion) (“[a] commercial speech regulation ‘may not be sustained if it provides only ineffective or remote support for the government’s purpose’”) (citations omitted)).

<sup>141</sup> 42 U.S.C §§ 3604-06, 3617 (1969); see Schwemm, *supra* note 9, at 194.

<sup>142</sup> Proponents of the Supreme Court’s plurality opinion in *44 Liquormart* would suggest that speech related to any lawful transaction be subject to strict scrutiny. *44 Liquormart*, 517 U.S. 484.

<sup>143</sup> As described *infra*, Section IV 4.c, religion is a less clear category because of the overlap with ethnicity.

<sup>144</sup> Senator Mondale explained that segregation and the resulting “ghetto schools” created “[o]ne of the most significant barriers impeding progress and opportunity for Negroes.” See 114 Cong. Rec. 2275, 2276 (1968). Senator Javits stated that “the segregation index of racial residential dissimilarity in 207 cities” is such that, as of 1960, “86 percent of the urban Negro population would have to move to all-white or integrated slums in largely all-white neighborhoods if the segregation was to be at zero.” See 114 Cong. Rec. 2704 (1968). Congressman Halpern stated, “[W]e will never bring it about that Negro pupils and white pupils go to school together—until we make it possible for Negroes to obtain housing outside the ghetto areas of our cities.” See 114 Cong. Rec. 9589 (1968).

<sup>145</sup> The legislative history of the amendments outlawing discrimination on the basis of sex and familial status describes the need to eliminate these types of discrimination, but says nothing about creating residential integration for these groups. See Schwemm, *supra* note 9 at 279 n.417. One sentence in the 1988 Amendments suggests that there was an interest in mainstreaming handicapped persons: “The Fair Housing Amendments Act [] is a clear pronouncement of a national commitment to end the unnecessary exclusion of persons with handicaps from the mainstream.” See H.R. Rep. No 100-711 at 18 (1988), reprinted in 1988 U.S.C.C.A.N. 2179; see also Schwemm, *supra* note 9 at 279 n.417. By contrast, the 1988 Amendments contain almost a full page describing the continuing problem of racial segregation. See H.R. Rep. No 100-711 at 15-16 (1988), reprinted in 1988 U.S.C.C.A.N. 2176-77.

<sup>146</sup> See *R.A.V. v. City of St. Paul*, 505 U.S. 377, 380 (1992). The Court’s five-member majority concluded that St. Paul had failed to show that the statute served a compelling interest: “[T]he only interest distinctively served by the content limitation is that of displaying the city council’s special hostility toward the particular biases thus singled out. That is precisely what the First Amendment forbids.” *Id.* at 396. For a broader discussion, including the concerns expressed by the dissenting justices, see Schwemm, *supra* note 9, at 285-289.

<sup>147</sup> See Schwemm, *supra* note 9, at 225-26.

<sup>148</sup> See *Spann v. Colonial Village, Inc.*, 899 F.2d 24, 30 (D.C. Cir. 1990) (holding that housing organizations that might need to increase educational programs to combat the misimpression created by real estate advertisements that featured only white models had standing).

<sup>149</sup> See *Bates v. State Bar of Arizona*, 433 U.S. 350, 375 (1977) (holding that total ban on advertising prices for “routine” legal services violated the First Amendment where disclaimers or warnings could be required to dissipate the possibility of misleading the public); *Peel v. Attorney Regis. & Discip. Comm’n of Ill.*, 496 U.S. 91, 117 (1990) (holding that an attorney had a First Amendment right to advertise his certification as a trial specialist by the National Board of Trial Advocacy (NBTA), but the State could require him to include a disclaimer stating that the NBTA is a private organization not sanctioned by the State or Federal government).

<sup>150</sup> *Saint Francis College v. Al-Khazraji*, 481 U.S. 604, 614 (1987) (Brennan, J. concurring).

<sup>151</sup> 42 U.S.C §§ 1981, 1982 (2001).

<sup>152</sup> In *Shaare Tefila Congregation v. Cobb*, 481 U.S. 615 (1987) the Supreme Court explained:

[T]he Court of Appeals erred in holding that Jews cannot state a § 1982 claim against other white defendants. That view rested on the notion that because Jews today are not thought to be members of a separate race, they cannot make out a claim of racial discrimination within the meaning of § 1982. . . . [T]he question before us is . . . whether, at the time § 1982 was adopted, Jews constituted a group of people that Congress intended to protect. It is evident from the legislative history. . . that Jews and Arabs were among the peoples then considered to be distinct races and hence within the protection of the statute. Jews are not foreclosed from stating a cause of action against

other members of what today is considered to be part of the Caucasian race.

*Id.* at 617-18. See also *Jones v. Alfred H. Mayer Co.*, 392 U.S. 409, 449 (1968) (Douglas, J., concurring) (“[T]he Congress that passed the so-called Open Housing Act in 1968 did not undercut any of the grounds on which § 1982 rests”). See also Schwemm, *supra* note 9.

<sup>153</sup> See generally, Letti Volpp, *The Citizen and the Terrorist*, 49 UCLA L. REV. 1575 (2002).

<sup>154</sup> The Court explained:

As observed above, the white ‘majority’ itself is composed of various minority groups, most of which can lay claim to a history of prior discrimination at the hands of the State and private individuals. Not all of these groups can receive preferential treatment and corresponding judicial tolerance of distinctions drawn in terms of race and nationality, for then the only ‘majority’ left would be a new minority of white Anglo-Saxon Protestants. There is no principled basis for deciding which groups would merit ‘heightened judicial solicitude’ and which would not. Courts would be asked to evaluate the extent of the prejudice and consequent harm suffered by various minority groups. Those whose societal injury is thought to exceed some arbitrary level of tolerability then would be entitled to preferential classifications at the expense of individuals belonging to other groups. Those classifications would be free from exacting judicial scrutiny. As these preferences began to have their desired effect, and the consequences of past discrimination were undone, new judicial rankings would be necessary. The kind of variable sociological and political analysis necessary to produce such rankings simply does not lie within the judicial competence—even if they otherwise were politically feasible and socially desirable.

*Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265, 295-97 (1978).

<sup>155</sup> During Ramadan, the ninth month of the Muslim calendar, observant Muslims fast during daylight hours. See Ramadan on the Net, Holidays on the Net, <http://www.holidays.net/ramadan/> (last visited Aug. 25, 2008).

<sup>156</sup> Were such ads permissible, a Pakistani woman wishing to discriminate against all non-Pakistanis could place an ad that said “No Christians.” Because the overwhelming majority of Pakistani Americans are Muslim, see Tinaz Pavri, Pakistani Americans: Overview-Religion, <http://www.everyculture.com/multi/Le-Pa/Pakistani-Americans.html> (last visited Jan. 21, 2008), she could impermissibly dissuade many non-Pakistanis from applying, without significantly reducing the pool of applicants she finds acceptable.

<sup>157</sup> See Robert C. Ellickson, *Unpacking the Household: Informal Property Rights Around the Hearth*, 116 YALE L.J. 226, 252 (2006). Ellickson describes how “[m]ost people prefer to consort with those who share their orientations and attitudes.” He states that co-occupants are likely to choose others of similar tastes, and that “to the extent that tastes vary according to attributes such as social class, age, gender, and ethnicity, participants in a household relationship can be expected to show a tendency to cluster accordingly.”

<sup>158</sup> Intentional communities united by religious belief have been uniquely successful. Ellickson contrasts long-lived religious sects that require “dozens of adult residents of each of their communities to dine together for virtually all meals,” like the Hutterites, who were organized in 1528 and currently have about 8000 members living on eighty-nine rural settlements in the United States, and convents of the Order of Saint Benedict, established in 530 and maintaining just under 7000 members in a total of 174 monasteries and convents in the United States, with the “secular experiments with strongly communal forms of living and dining [that] implode[d] within a handful of years”: Brook Farm in Massachusetts (1841-47), New Harmony in Indiana (lasting only a few years starting in 1825), and Oneida in New York (1848-1881). *Id.* at 272-73.

<sup>159</sup> “[A] pan used to fry a hamburger or a pot used to make stew become fleishig. If the fleishig pot or pan is then used to boil milk, [Jewish Law] has been violated.” Religion Facts – Keeping Kosher: Jewish Dietary Laws, <http://www.religionfacts.com/judaism/practices/kosher.htm> (last visited Aug. 25, 2008).

<sup>160</sup> Believers may be reincarnated into a higher caste only if they have followed the rules of their caste during their previous life. “In this way karma has discouraged people from attempting to rise to a higher caste or to cross caste lines for social relations of any kind.” “Caste (social),” Microsoft Encarta Online Encyclopedia 2007, <http://encarta.msn.com/encnet/refpages/RefArticle.aspx?refid=761565041> (last visited Aug. 25, 2008).

<sup>161</sup> “All holidays, including birthdays, are considered ‘pagan holidays’ and may not be observed by Witnesses.” Religion Facts – Jehovah’s Witnesses and Holidays, [http://www.religionfacts.com/jehovahs\\_witnesses/holidays.htm](http://www.religionfacts.com/jehovahs_witnesses/holidays.htm) (last visited Aug. 25, 2008).

<sup>162</sup> Placing ads exclusively in such locations would violate the FHA: 24 C.F.R. § 100.75(3), which prohibits “selecting media or locations for advertising the sale

or rental of dwellings which deny particular segments of the housing market information about housing opportunities because of . . . religion . . .” However, roommate seekers could include these locations among the places they list their ads. And, realistically, it is unlikely that anyone would sue an Orthodox Jew who, seeking a kosher roommate, listed his apartment exclusively on the bulletin board at his synagogue or in a local Jewish newspaper.

<sup>163</sup> *Employment Div., Dep’t of Human Res. of Oregon v. Smith*, 494 U.S. 872, 881 (1990) (holding that Oregon’s application of a generally applicable criminal prohibition to the sacramental use of peyote by members of the Native American Church did not violate the free exercise clause).

<sup>164</sup> 42 U.S.C. §§ 2000bb (2001).

<sup>165</sup> See ARIZ. REV. STAT. ANN. §§ 41-1493 to -1493.02 (West 2004); CONN. GEN. STAT. ANN. § 52-571b (West Supp. 2004); FLA. STAT. ANN. §§ 761.01-.05 (West Supp. 2004); IDAHO CODE §§ 73-401 to -404 (Michie Supp. 2004); 775 ILL. COMP. STAT. ANN. 35/1-99 (West 2001 & Supp. 2004); MO. ANN. STAT. §§ 1.302-.307 (West Supp. 2004); N.M. STAT. ANN. §§ 28-22-1 to 28-22-5 (Michie Supp. 2000); OKLA. STAT. ANN. tit. 51, §§ 251-258 (West Supp. 2004); 71 PA. CONS. STAT. ANN. §§ 2401-2407 (West Supp. 2004); R.I. GEN. LAWS §§ 42-80.1-1 to -4 (1998); S.C. CODE ANN. §§ 1-32-10 to -60 (West Supp. 2003); TEX. CIV. PRAC. & REM. CODE ANN. §§ 110.001-.012 (Vernon 2004).

<sup>166</sup> See *City of Boerne v. Flores*, 521 U.S. 507 (1997).

<sup>167</sup> See *Gonzalez v. O Centro Espirita Beneficente Uniao do Vegetal*, 546 U.S. 418 (2006) (holding that the government failed to demonstrate a compelling state interest in prohibiting a religious sect’s sacramental use of a hoasca tea containing DMT, a hallucinogenic regulated under the Controlled Substances Act).

<sup>168</sup> *Sherbert v. Verner*, 374 U.S. 398 (1963) (creating exemptions under the free exercise clause when a generally applicable law that did not pass strict scrutiny substantially burdened religious conduct); *Wisconsin v. Yoder*, 406 U.S. 205, 234 (1972), (holding that a compulsory education law violated the free exercise rights of the Amish).

<sup>169</sup> See *Hunt v. Hunt*, 162 Vt. 423, 436 (1994); *State v. Hershberger*, 462 N.W. 2d 393, 397-98 (Minn. 1990); *Rourke v. N.Y. State Dept. of Corr. Serv.*, 603 N.Y.S. 2d 647, 649-50 (N.Y. Sup. Ct. 1993) (*aff’d*, 615 N.Y.S.2d 470, 472-73 (N.Y. App. Div. 1994)). For an exhaustive list, see Douglas Laycock, *Theology Scholarships, the Pledge of Allegiance, and Religious Liberty: Avoiding the Extremes but Missing the Liberty*, 118 HARV. L. REV. 155, 211-12 (2004).

<sup>170</sup> See *State by Cooper v. French*, 460 N.W.2d 2, 9-11 (Minn. 1990) (The court upheld a landlord’s right not to rent to unmarried cohabitants. Three justices held that the Minnesota Constitution granted far broader religious freedom protection than the United States Constitution. Finding the text of the fair housing statute dispositive, the concurring justice did not reach the constitutional question.); *Attorney General v. Desilets*, 636 N.E.2d 233, 240, 243 n.15 (Mass. 1994) (The court held that the fair housing law substantially burdened the landlord’s free exercise rights, but whether Massachusetts had a compelling interest in ensuring rental housing to unmarried people was a fact question precluding summary judgment. Three dissenting justices held that the Massachusetts constitution “absolutely protect[ed] the defendants’ right to decline to lease any premises to a cohabitating couple”).

<sup>171</sup> *Smith v. Fair Hous. & Employment Comm’n* (Evelyn Smith), 12 Cal.4th 1143 (1996) (plurality opinion).

<sup>172</sup> *Evelyn Smith* predated *City of Boerne v. Flores*, and thus the Court reviewed Smith’s case under the federal RFRA, but an analysis under a state RFRA would likely be similar.

<sup>173</sup> 12 Cal.4th at 1166-67.

<sup>174</sup> See Christopher L. Eisgruber & Lawrence G. Sager, *The Vulnerability of Conscience: The Constitutional Basis For Protecting Religious Conduct*, 61 U. CHI. L. REV. 1245, 1247 (1994). Describing the test in religious freedom cases as “strict in theory but feeble in fact,” Eisgruber and Sager explain that modern strict scrutiny has been relatively deferential. However, as discussed, prohibitions on discriminatory roommate advertisements related to religious practice are unlikely to be upheld even under intermediate scrutiny. In jurisdictions where courts apply rational basis review to RFRA claims, seeking protection under a RFRA would be a less viable option than raising a free speech challenge as described in section IV.4.b.

<sup>175</sup> See *See Bd. of Trs., State Univ. of N.Y. v. Fox*, 492 U.S. 469; *supra* note 103.

<sup>176</sup> See the discussion in Part IV 4.c regarding advertisements that describe religion-as-belief versus religion-as-ethnicity.

<sup>177</sup> See *supra* Part IV.4.b-c.

<sup>178</sup> 12 Cal. 4th at 1173 (“[i]t is well established that there is no substantial burden placed on an individual’s free exercise of religion where a law or policy [regulating secular conduct] merely ‘operates so as to make the practice of [the individual’s] religious beliefs more expensive’”) (citations omitted).

<sup>179</sup> Between 2001 and 2004, the number of households paying more than half their income for housing—considered “severe cost burdens”—increased by

nearly 2 million to a record 15.8 million. The total record of households paying at least 30 percent of income on housing—considered “at least moderate cost burdens”—rose from 31.3 million to over 35 million. The incidence is higher among renters. THE STATE OF THE NATION’S HOUSING 2006, Joint Center for Housing Studies of Harvard University, pg. 25, available at <http://www.jchs.harvard.edu/publications/markets/son2006/index.htm> (last visited Aug. 25, 2008).

<sup>180</sup> *Boy Scouts of America v. Dale*, 530 U.S. 640, 648 (2000) (quoting *Roberts v. Jaycees*, 468 U.S. 609, 622 (1984) (New Jersey’s public accommodations law held to violate the Boy Scout’s rights to freedom of association by forcing the organization to retain an openly gay assistant scoutmaster)).

<sup>181</sup> 468 U.S. at 624-25.

<sup>182</sup> 530 U.S. at 648.

<sup>183</sup> *Id.* at 659.

<sup>184</sup> *Id.* at 655 (describing its decision in *Hurley v. Irish-Am. Gay, Lesbian & Bisexual Group of Boston, Inc.*, 515 U.S. 557 (1995)) (purpose of St. Patrick’s day parade “was not to espouse any views about sexual orientation, but we held that the parade organizers had a right to exclude certain participants nonetheless.”).

<sup>185</sup> 530 U.S. at 659.

<sup>186</sup> See *Fair Hous. Council of San Fernando Valley v. Roommates.com, LLC*, 489 F.3d 921, 930 n.2 (9th Cir. 2007) (Reinhardt, J., concurring) (court’s emphasis).

<sup>187</sup> As discussed *supra* in Part IV.1, such roommate seekers may also raise applied intimate association challenges, arguing that the prohibitions directly and substantially interfere with their ability to create an association.

<sup>188</sup> See *supra* Part IV.4.b.

<sup>189</sup> 530 U.S. at 661 (stating “We are not, as we must not be, guided by our views of whether the Boy Scouts’ teachings with respect to homosexual conduct are right or wrong; public or judicial disapproval of a tenet of an organization’s expression does not justify the State’s effort to compel the organization to accept members where such acceptance would derogate from the organization’s expressive message”).

<sup>190</sup> Additionally, devout roommate seekers may assert a hybrid-rights claim, arguing that the advertising restrictions should be reviewed under strict scrutiny because more than one constitutional right is implicated: their free exercise rights coupled with either expressive association, intimate association, or free speech rights. In *Smith*, the Supreme Court suggested that a higher standard of review may apply where a case involved the Free Exercise clause in conjunction with other constitutional protections. *Employment Div., Dep’t of Human Res. of Oregon v. Smith*, 494 U.S. 872, 882 (1990). However, to date, the Court has yet to apply strict scrutiny to a hybrid-rights claim, and Justice Souter has criticized the theory in a concurring opinion. See *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 567 (1993) (Souter, J. concurring) (“[i]f a hybrid claim is simply one in which another constitutional right is implicated, then the hybrid exception would probably be so vast as to swallow the *Smith* rule....”). Furthermore, the Second and Sixth Circuits have explicitly rejected the hybrid rights language from *Smith* as dicta, concluding the standard of review should not vary “simply with the number of constitutional rights that the plaintiff asserts have been violated.” *Leebaert v. Harrington*, 332 F.3d 134, 144 (2d Cir. 2003); see also *Kissinger v. Bd. of Trs. of the Ohio State Uni., Coll. of Vet. Med.*, 5 F.3d 177 (6th Cir.1993). Thus, the hybrid-rights approach seems a less viable option.

<sup>191</sup> See 42 USCA § 3604(c) (2003).

<sup>192</sup> See, e.g., *Ragin v. Harry Macklowe Real Estate Co.*, 6 F.3d 898, 905 (2d Cir. 1993) (Plaintiff could bring action if housing ads “‘suggest[ed] to an ordinary reader that a particular race [was] preferred or dispreferred for the housing in question,’ regardless of the defendant’s intent”) (quoting *Ragin v. N.Y. Times Co.*, 923 F.2d 995, 1000 (2d Cir. 1991)); see also Schwemm, *supra* note 9, at 210-11.

<sup>193</sup> See GUIDELINES ON HOW TO ADVERTISE WITHOUT VIOLATING HOUSING DISCRIMINATION LAWS, available at [http://www.ndfhc.org/fair\\_housing/PDF-NDDOL%20Fair%20Housing%20Ads.pdf](http://www.ndfhc.org/fair_housing/PDF-NDDOL%20Fair%20Housing%20Ads.pdf) (last visited Aug. 25, 2008). Because the statement and advertisement prohibitions are both contained in 42 USCA § 3604(c), the same phrases would likely create liability in either context.

<sup>194</sup> *Id.*

<sup>195</sup> Those who strictly observe the Sabbath are forbidden from activities including, but not limited to: using the phone, operating anything electric or electronic, and flipping light switches from 18 minutes before sunset on Fridays until night-fall (approximately 40 minutes after sunset) on Saturdays. See Ask Moses, [http://www.askmoses.com/article\\_list.html?h=208](http://www.askmoses.com/article_list.html?h=208) (last visited Aug. 25, 2008).

<sup>196</sup> *Carey v. Brown*, 447 U.S. 455, 471 (1980).

<sup>197</sup> *Carey v. Population Servs., Int’l*, 431 U.S. at 689 n.5 (emphasis added).

<sup>198</sup> The District of Columbia Human Rights Act prohibits discrimination based on a wider range of criteria including political affiliation. D.C. CODE ANN. § 1-2512(a) (1992).

<sup>199</sup> See Goffman, *supra* note 55.

<sup>200</sup> The complainant in *Department of Fair Employment & Housing v. Larrick* who was subjected to a racist statement during a telephone conversation described how her experience “changed her feelings about Caucasians,” stating that she “began to avoid socializing with Caucasians, except her mother.” Dep’t of Fair Employment & Hous. v. Larrick, No. H 95-96 Q-0510-02, 1998 CAFEHC LEXIS 15, \*8.

<sup>201</sup> See *Riley v. Nat’l Fed’n of the Blind of N.C.*, 487 U.S. 781, 796 (1988).

<sup>202</sup> *S. Suburban Hous. Ctr. v. Greater S. Suburban Bd. of Realtors*, 935 F.2d 868, 888 (7th Cir. 1991). (quoting *Members of the City Council v. Taxpayers for Vincent*, 466 U.S. 789, 804 (1984)).

<sup>203</sup> See generally, *R.A.V. v. City of St. Paul*, 505 U.S. 377 (1992). The statute under review only outlawed cross-burning only when the underlying purpose was to insult or provoke violence “on the basis of race, color, creed, religion or gender” and was therefore unconstitutional content discrimination. *Id.* at 391.

<sup>204</sup> *Id.* at 396.

<sup>205</sup> Although St. Paul argued that its statute fell within an exemption permitting content discrimination aimed at the “secondary effects” of speech, *id.* at 394 (citation omitted), the Court stated that “[l]istener’ reactions to speech’ are not a type of secondary effect that make content discrimination constitutional. *Id.* at 394. “The emotive impact of speech on its audience is not a ‘secondary effect.’” *Id.* (citation omitted).

<sup>206</sup> Jack Glaser & Kimberly Kahn, *Prejudice, Discrimination, and the Internet, in THE SOCIAL NET: UNDERSTANDING HUMAN BEHAVIOR IN CYBERSPACE* 247, 248 (Yair Amichai-Hamburger ed., 2005) (citing F. Crosby, S. Bromley, & L.Saxe, *Recent Unobtrusive Studies of Black and White Discrimination and Prejudice: A Literature Review*, 87 PSYCHOL. BULL. 546-63 (1980)).

<sup>207</sup> *Id.*

<sup>208</sup> *Id.* Glaser and Kahn compare behavior in cyberspace to the pre-civil rights era conduct revealed in a classic study conducted by sociologist R.T. LaPiere. As reported in Richard T. LaPiere, *Attitudes vs. Actions*, 13 SOC. FORCES 230-37 (Dec. 1934), LaPiere traveled around the United States with a Chinese couple in 1934 seeking public accommodations in hotels, auto camps, restaurants, and cafés. They were only turned away 1 out of 251 times. Six months later, LaPiere sent questionnaires to each of the establishments and asked if they would accommodate a Chinese guest. Over 90% responded that they would not. LaPiere’s analysis focused on the unreliability of questionnaires as predictors of how people will behave when confronted with a live human being, but the study also suggests that people are more likely to express overt prejudice in an anonymous, disinhibited forum. *Id.* at 236.

<sup>209</sup> Glaser & Kahn, *supra* note 206, at 250.

<sup>210</sup> *Frontline: Growing up Online*: (PBS television broadcast Jan. 22, 2008), available at <http://www.pbs.org/wgbh/pages/frontline/kidsonline/> (Go to chapter 6, *Cyberbullying*, at approximately 4:18).

<sup>211</sup> Dep’t of Fair Employment & Hous. v. Larrick, No. H 95-96 Q-0510-02, 1998 CAFEHC LEXIS 15, \*7.

<sup>212</sup> Dep’t. of Fair Employment & Hous. v. Baker, No. H 97-98 Q-0649-00gu, 1999 CAFEHC LEXIS 14, \*4.

<sup>213</sup> Dep’t of Fair Employment & Hous. v. DeSantis, No. 02-12, 2002 WL 1313078 (Cal.F.E.H.C.) at \*3.

<sup>214</sup> *Marya v. Slakey*, 190 F.Supp.2d 95, 98 (D.Mass 2001).

<sup>215</sup> See *Zablocki v. Redhail*, 434 U.S. 374 (1978).

<sup>216</sup> See generally Thomas F. Pettigrew & Linda R. Tropp, *A Meta-Analytic Test of Intergroup Contact Theory*, 90 J. PERSONALITY & SOC. PSYCHOL. 751 (2006). Synthesizing 713 independent samples from 515 studies, Pettigrew and Tropp conclude that intergroup contact typically reduces intergroup prejudice. The positive effects of intergroup contact are enhanced by equal status between the groups in the situation, common goals, intergroup cooperation, and the support of authorities, law or custom, but these conditions are not essential for the contact to achieve a positive outcome. *Id.* at 766. Their analysis shows that intergroup contact effects generalize beyond the individuals in the particular situation, improving attitudes towards the entire outgroup and even outgroups not involved in the interaction. *Id.* They acknowledge that negative interactions can raise anxiety and feelings of threat, hindering the development of favorable attitudes. *Id.* at 767, n.13. But, the vast majority of samples in their analysis show an inverse relationship between intergroup contact and prejudice. *Id.* at 766.

# MATERIAL SUPPORT TO TERRORISTS OR TERRORIST ORGANIZATIONS: ASYLUM SEEKERS WALKING THE RELIEF TIGHTROPE

By  
Craig R. Novak\*

## INTRODUCTION

In 2000, a thirty-year-old female dentist with an international relief organization prepares for surgery in a tent marked "Hospital." Her patient, a ten-year-old boy, has several infected molars. The hospital is located in the southernmost part of Putumayo, Colombia near the border of Ecuador. The boy squirms in his chair knowing that the needle in the dentist's hand will soon be injecting into his gums. "¡Tranquilo Niño! I have done this many times and you need to be a brave boy!"

Just as she places the needle in the child's mouth, she hears the sound of the tent flap opening. Entering are two easily identifiable members of the Revolutionary Armed Forces of Colombia ("F.A.R.C.") - one of Colombia's most notorious guerilla organizations. With eyes yellowed from jaundice and glazed with hate, they surround the dentist. "I am operating here!" she protests. "Shut-up bitch!" one states as he pulls her surgical cap off, yanks her hair back, and sticks his AK-47 hard into her neck. The other man moves his filthy hands along each surgical instrument. "You will operate on this man and his teeth." With that statement, the man who contaminated the instruments slaps the child out of the chair and sits in it himself. Knowing that any sudden move would be her death, the dentist looks inside the mouth of the guerilla member and begins to work.

Fortunately for the dentist, she was granted asylum before the Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act of 2001 ("PATRIOT Act") took effect in 2001, and before the passage of the REAL ID Act in 2005. Had she sought asylum any later, the U.S. government would have barred her from applying. Under the PATRIOT Act and REAL ID Act, she had committed a terrorist act by giving material support to individuals that she knew belonged to a terrorist organization.

The REAL ID Act provides arcane and widely unknown relief provisions that, in some limited cases, offset the harshness of the act. Relief under the REAL ID Act is tenuous as it can be revoked at any time, and the asylum seeker must navigate its narrow legal path. This is the tightrope. One misstep would bar an asylum application.

Part I of this article will give an overview and the legislative background of the PATRIOT Act and the REAL ID Act as they apply to asylum seekers. Part II will explore examples of the material support bar and its devastating effect on asylum applicants. Part III will describe the new forms of relief under the REAL ID Act, offer case law defining duress in a criminal and immigration context, and explain the totality of circumstances test. Lastly, part IV presents a practitioner's checklist for those who wish to assist clients with their exemption to the material support bar.

## I. OVERVIEW AND LEGISLATIVE HISTORY

### *THE PATRIOT ACT OF 2001*

When American Airlines Flight 11 hit the first tower on September 11, 2001, the legal landscape in the U.S. for asylum seekers, changed forever. Pushed by the Bush administration,<sup>1</sup> Congress, with very little debate,<sup>2</sup> passed the PATRIOT Act. The PATRIOT Act only expanded existing inadmissibility provisions and did not add any new provisions affecting asylum seekers.<sup>3</sup> Asylum seekers had already been barred from both asylum and withholding of removal if they had participated in terrorist activities since the 1996 Anti-Terrorism and Effective Death Penalty Act ("AEDPA") and the Illegal Immigration Reform and Immigrant Responsibility Acts ("IIRIRA").<sup>4</sup> But the lack of new provisions did not mean the PATRIOT Act had no impact. Expanding the existing anti-terrorism provisions via the PATRIOT Act broadened the asylum bars not only to terrorists, but also in many cases, to their victims.<sup>5</sup>

Prior to the PATRIOT Act, the Secretary of State had designated twenty-seven Foreign Terrorist Organizations.<sup>6</sup> After the passage of the PATRIOT Act, the Secretary of State Donald Rumsfeld used his authority granted under INA § 219 to designate an additional fifteen Foreign Terrorist Organizations, altogether referred to by the Department of Homeland Security ("DHS") as Tier I. The PATRIOT Act also authorized the Secretary of State to designate a new class of terrorist organizations under the "Terrorist Exclusion List," otherwise known as Tier II.<sup>7</sup> Added together, 100 terrorist organizations have been officially identified.<sup>8</sup>

A third terrorist organization category added by the PATRIOT Act is called the "undesignated category" or Tier III. This is the catch-all of the PATRIOT Act codified under INA § 212(a)(3)(B)(vi)(III), as the definition of terrorist organizations was expanded to "a group of two or more individuals, whether organized or not, which engages in terrorist activities."<sup>9</sup> Asylum proponents worry most about this category because the broadly worded provisions are open to a gamut of interpretations. For example, student protesters throwing bricks at government forces to intentionally cause bodily harm, could be considered to have (1) formed a terrorist organization and (2) have committed terrorist acts. These students would be barred from asylum regardless of their persecution claims.<sup>10</sup>

Prior to the PATRIOT Act, in order for an applicant to fall under the inadmissibility provisions for a terrorist activity, material support had to be given with the knowledge that the support was going to a group planning terrorist activity. Under the PATRIOT Act, the applicant, who gives material support is barred whether or not he had any knowledge that the group was about to commit a terrorist act.<sup>11</sup>

Congress believed that the PATRIOT Act granted DHS the tools needed to filter terrorists out of the immigration process. In late 2004 however, the Commission on 9/11 released its initial public report and pointed out that asylum was an even bigger portal to terrorists than initially believed.<sup>12</sup> In light of the report, certain members of the House of Representatives Rep. Steve Chabot (R-OH), Rep. John Hostettler (R-IN), Rep. Daniel Lungren (R-CA), Rep. Randy Forbes (R-VA), Rep. Mary Bono (R-CA), Rep. Peter Hoecstra (R-MI), and Rep. Randy Neugenbauer (R-TX), felt that they had the moral authority to slam that portal shut,<sup>13</sup> culminating in one of the most powerful assaults on asylum in Congress' fifty year history: the REAL ID Act of 2005.

### THE REAL ID ACT OF 2005

The REAL ID Act comprised of twenty-nine amendments to the Immigration and Nationality Act ("INA").<sup>14</sup> While most famous for the yet unimplemented requirement that states make driver's license applicants prove their lawful immigration status, the REAL ID Act also changed many asylum elements, such as requiring that race, religion, nationality, membership in a social group, or political opinion, be central to the applicant's persecution claim.<sup>15</sup> In addition, the REAL ID Act established a "totality of the circumstances" test, which requires that the trier of fact base credibility on the applicant's demeanor, candor, responsiveness, and the internal consistency of the applicant's statements.<sup>16</sup> Also of note is the REAL ID's elimination of the writ of habeas corpus from removal proceedings. Lastly, REAL ID added relief to the material support bar under the definitions of terrorist activities, allowing the Secretary of State to waive the asylum bar for particular inadmissibility provisions.

Congress holds the Secretary of DHS accountable for these waivers, and should he activate them, he must report to several House and Senate committees within one week of the waiver, and annually report the number of individuals waived.<sup>17</sup> Considering its harsh nature toward asylum seekers, the idea that the REAL ID Act provides any relief at all seems quite incongruous. Understanding the nature of REAL ID and the tenor of its Congressional sponsors requires an examination of its legislative history. Only then will it be clear why asylum applicants seem to be under such an onerous burden of proof, and why its relief provisions seem almost an oversight.

### LEGISLATIVE HISTORY OF THE MATERIAL SUPPORT PROVISIONS

The Chairman of the Judiciary Committee, Representative F. James Sensenbrenner, Jr. (R - WI), pushed for modifying the material support provisions to terrorists because he and other Representatives were concerned that a person who was involved with terrorism could become an asylum applicant. During the Congressional floor debates, Representative John Hostettler (R - IN) stated that the current law misunderstood the real workings

of a terrorist organization because actual terrorists often used humanitarian work projects to fund their "criminal" functions as money is fungible and can go to "bullets ...instead of babies."<sup>18</sup> The legislative debate over REAL ID shows that few of its provisions have unintended consequences.<sup>19</sup>

The material support provisions were designed to be an unforgiving filter for asylum seekers.

### ELEMENTS OF THE MATERIAL SUPPORT PROVISIONS

The material support bar of the REAL ID Act breaks down into three elements where (1) the applicant knows or should have known (*mens rea*) that (2) the material support the applicant provided (3) was to a terrorist organization. Due to the previous discussion defining terrorist organizations, only the first and second elements of the material support bar will be presented in detail.

#### MENS REA

The *mens rea* standard for knowing has gone through several iterations as it applies to the material support provisions. Prior to REAL ID, individuals had to have known or should have known that the material support that they gave furthered the goals of the terrorist organization.<sup>20</sup> Under REAL ID, the *mens rea* standard is much stricter. If an individual knows or should *reasonably* know that they are giving support to a terrorist organization, then the individual meets the *mens rea* requirement and is barred from applying for asylum.

Intent is not part of the current *mens rea* requirement.<sup>21</sup> It does not matter whether or not the individual gives material support with the intent to aid the organization or to harm others. Additionally, the individual does not have to give material support willingly. Even if an individual merely acquiesces to a guerilla organization under threat of harm, the *mens rea* requirement has been met because the individual gave material support knowing that it was aiding a terrorist organization.

The *Matter of S-K* shows the resolve of the Board of Immigration Appeals ("BIA") to enforce the *mens rea* standard strictly and literally. In *S-K*, an ethnic Chin woman provided money and supplies to the Chin National Front, who was protecting an ethnic group from the malicious assaults of the Burmese military junta. She was found credible, but was denied asylum because she knowingly supported a group who engaged in armed resistance.<sup>22</sup> *S-K* is continuing to impact the immigration community because the *mens rea* standard seems almost unassailable, even for "freedom fighters," or rebels against governments unrecognized by the United States.<sup>23</sup> Attacks on the *mens rea* standard have often differentiated those asylum applicants who have given material support knowingly but not willingly. Immigration judges and the BIA have struck down many such attacks post-Patriot Act, denying asylum to thousands of individuals who were forced to provide material support to terrorist organizations.<sup>24</sup>

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*If an individual knows or should reasonably know that they are giving support to a terrorist organization, then the individual meets the mens rea requirement and is barred from applying for asylum.*

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## DEFINITION OF MATERIAL SUPPORT

The INA defines material support as a “safe transportation, communications, funds, transfer of funds or other material financial benefit, false documentation or identification [and] weapons.” The Third Circuit Court of Appeals believes these are suggestions and not the entire spectrum of possibilities.<sup>25</sup> The BIA uses a “de minimis contributions” standard for examining cases of material support:<sup>26</sup> offering of food, arranging shelter for militants,<sup>27</sup> facilitating phone calls,<sup>28</sup> even providing a glass of water, are all bars to asylum.<sup>29</sup> By the BIA’s own admission, the statute is breath-taking in its scope.<sup>30</sup> Consequently, in *Cheema v. Ashcroft*, the Ninth Circuit limited the BIA’s broad definition of material support activities holding that where “not a scrap of evidence” shows that the aid recipients had anything to do with terrorism, the United States cannot impose the material support bar.<sup>31</sup>

## II. THE IMPACT OF THE MATERIAL SUPPORT PROVISION TO ASYLUM SEEKERS

Though there is no proof that the material support provisions had an overall impact on the asylum process, the total number of U.S. asylum cases dropped by 41.51% in the years 2001 to 2005.<sup>32</sup> Additionally, the number of asylum grants dropped by 11.95% in the years 2003 to 2005.<sup>33</sup> As of 2006, the United States had only allowed 26,113 asylees to enter.<sup>34</sup>

But the statistics showing the impact on specific nations, demonstrate that Congress had wielded an effective tool with the material provisions bar.<sup>35</sup> Colombia was hit particularly hard, seeing a 32.14% drop in asylum grants (from 4,368 to 2,964) since REAL ID.<sup>36</sup> Responding to the prolonged civil war, and the surge of refugees crossing into Ecuador, the United Nations High Commissioner for Refugees (“UNHCR”) began trying in 2001 to resettle Colombians in the United States.<sup>37</sup> Starting with an initial referral group of 288 refugees in 2003, the number dwindled to thirty-five and then to nothing, when the United States began indefinitely deferring any Colombians who raised material support issues.<sup>38</sup> UNHCR believes that 70 to 80% of these Colombian refugees would be barred under the material support provisions.<sup>39</sup>

The material support provision has barred people of many other nationalities, including a Sri Lankan man kidnapped by guerillas and forced to pay them ransom from his entire life savings; a Liberian woman, whose captors killed her father, gang-raped her multiple times, and forced her to wash their clothes;<sup>40</sup> and a Nepalese man beaten by a gang of Maoist rebels, who surrendered all of his money and fled to the United States when he was told that the gang would come again. His case has languished in review since his 2002 application was submitted.<sup>41</sup>

The negative impact of the material support bar to asylees is not without its critics. After interviewing dozens of Colombians barred from asylum and living under oppressive circumstances in Ecuador, the Georgetown Law Center for Human Rights Fact-Finding Investigation made recommendations to Congress that the material support bar should be amended to allow exceptions for involuntary provisions, mistaken compliance, and insignificant support to terrorist organizations.<sup>42</sup> Lifting the bar for these exceptions would allow the U.S. to regain balance between protecting the safety of its citizens and being the humanitarian nation that it so claims to be.

## THE GUIDE TO THE RELIEF PROVISIONS: HOW TO WALK THE TIGHTROPE

Regardless of the reasons, relief has come to some asylum applicants. Michael Chertoff, Secretary of Homeland Security, used his authority granted under the relief provisions of the REAL ID Act, to create some exemption from the material support bar in five memorandums in 2007.<sup>43</sup> While some asylum seekers may benefit from these exemptions, the exemptions are still complicated and narrow.

## BURDENS AND EXEMPTIONS UNDER THE MATERIAL SUPPORT BAR

No presumption that an applicant has provided material support to a terrorist organization exists.<sup>44</sup> Generally, the applicant is the one who will bring up the material support issue either within his asylum affidavit or when answering a question by the asylum officer. Additionally, the Asylum Officer may infer that an applicant encountered a terrorist group because of the location of the applicant’s home. Once the issue of material support is raised, the applicant carries the burden of proving that the organization was not a terrorist organization, that he or she did not know it was a terrorist organization, or that he or she is entitled to the material support relief.

Currently, there are only three categories of applicants eligible for material support relief:

- (1) Applicants who provided material support to *only* designated groups with no conditions;<sup>45</sup>
- (2) Applicants who provided material support to Tier III (undesignated terrorist organizations)<sup>46</sup> on the condition that (1) the applicants supplied the material support under duress and (2) applications are validated by the “totality of the circumstances” test;
- (3) Applicants who provided material support to specified Tier I and Tier II Terrorist Organizations (currently only applicable to F.A.R.C.) on the condition that (1) the applicants supplied the material support under duress and (2) applications are validated by the “totality of the circumstances” test.<sup>47</sup>

## CONDITION 1: THE DURESS EXEMPTION<sup>48</sup>

Asylum applicants prove duress when they show that they had no or very little choice in providing material support to a terrorist organization because they would face serious, life-threatening circumstances, if they did not comply.

DHS field officers observe the following factors to determine whether an applicant will receive a duress exemption:

- The extent to which the applicant reasonably could have avoided or took steps to avoid, providing material support
- The severity and type of harm inflicted or threatened
- The person to whom the harm or threat of harm was directed

- The perceived imminence of the harm threatened
- The perceived likelihood that the threatened harm would be inflicted
- Any other relevant factor regarding the circumstances under which the applicant felt compelled to provide the material support.<sup>49</sup>

While not involving an immigration cause of action, the case of *United States v. Contento-Pachon*, provides guidance for the workings of a duress defense. Here, the Ninth Circuit, determined whether a Colombian citizen had a duress defense for narcotics trafficking. The court noted that proving duress requires, a) immediate threat of death or serious bodily injury; b) a well-grounded fear that the threat will be carried out; and, c) no reasonable opportunity to escape the threat.<sup>50</sup>

In the Third Circuit case, *Arias v. Gonzales*, a fish farm manager who, with his family, was being threatened by the F.A.R.C., offered a duress defense to a material support charge.<sup>51</sup> The manager stated that he made “war payments” to the F.A.R.C., but also that he was making good money at the farm, and “doing well there.”<sup>52</sup> The court found that the nature of the manager’s payments disproved any duress factors as it seemed that the manager paid F.A.R.C. voluntarily because he enjoyed his lifestyle.<sup>53</sup>

### **CONDITION 2: THE TOTALITY OF THE CIRCUMSTANCES TEST**

Once DHS determines that the applicant has met the initial duress burden, it then applies the “totality of the circumstances” test. Generally, a court applies this test by balancing all the inferences involved in the suspicious conduct. Similarly, DHS advises its field officers to weigh factors such as the amount and type of material support the applicant provided, the frequency of material support provided, and the nature of the terrorist activities committed by the terrorist organization.<sup>54</sup> For instance, a comprehensive analysis of how the totality of the circumstances operates in an immigration (denaturalization) context, occurs in *Breyer v. Ashcroft*. In this case, the Third Circuit determined that a former World War II German soldier, who was actually a U.S. citizen, did not forsake his citizenship when becoming a member of the SS Corps.<sup>55</sup> The key issue was whether the soldier acted voluntarily in joining the *Totenkopf Sturmabteilung* (Death’s Head Battalion) at Auschwitz.<sup>56</sup> The court weighed the positive factors of the soldier trying to get leave every weekend, and his refusing to be tattooed with the SS mark, against the negative factors such as his reporting for his initial SS training, even though a politician volunteered to secure his release from the service.<sup>57</sup>

The “totality of the circumstances” test should be of concern to the immigration law practitioner because an adverse finding here will eliminate even a worthy applicant who can prove duress in giving material support.

## **III. PRACTITIONER’S GUIDE TO MATERIAL SUPPORT RELIEF**

Little, if any, aid exists to help the practitioner navigate this brave new world of material support relief. The goal of this checklist is to assist the practitioner in walking the tightrope of

the REAL ID waivers and to point out some of the hazards that exist along the way. It will help the practitioner to frame the approaches to their asylum applicant’s material support exemptions that would constitute a material support exemption for an asylum applicant.

The basic elements of an asylum claim have not changed. An applicant still has the burden of proof that one of the five protected areas (race, religion, nationality, political opinion, membership in a social group) is central to the persecution claim, and that the applicant filed a claim within one year of arrival. Practitioners should remember that Congress is guarded against the asylum system. Practitioners should also heed Michael Chertoff’s warning on each of these exemptions, that he may revoke the waiver at his discretion. In order to encourage use of the relief exemptions, practitioners can start by presenting DHS officers with asylum cases that directly fall under the exemption, gradually letting DHS and Congress know that those seeking the relief are not a danger to the nation.

### **CHECKLIST:**

#### **INITIAL STEPS IN FRAMING YOUR STRATEGY**

#### **1. Does your client even need to consider the material support exemption?**

##### **a. Has the client given any aid to anyone who may be considered a terrorist or belongs to a terrorist group?**

i. Consider whether the client has *ever* had any contact with any non-government groups that are on the State Department terrorist lists or could be considered terrorist organizations.

ii. The key point is “knowing or should have known” that (a) the client has given any aid and that (b) aid was given to a terrorist organization. If the client is not sure on these issues, the attorney should continue down the checklist.

1. Question the client about giving any aid to anyone that they remotely consider to be dangerous as a potential refresher of his or her memory.

a. Check both the Foreign Terrorist Organization List and the Terrorist Exclusion List available at the U.S. Department of State. See if the client is familiar with any of these names, and if so, the circumstance under which he or she is familiar.

2. Note that cases where the clients are not sure that they have given material support to a terrorist organization are fairly rare. Most clients are quite clear with whom they were dealing.

3. Remember that material support is de minimis:



- A cup of coffee, a glass of water, spare coins
- Food, shelter, repairs

4. The mens rea requirement is *knowing or should have known*:

- Even if client believes that his or her help will not further the terrorists' criminal activities, this does not exempt him or her from the material support bar.

iii. Listen for the DHS "buzz words" in your client's story.

1. DHS advised its field officers to watch for these words in an asylum interview:<sup>58</sup>

Ie. Ransom, War Tax, Slave, Force, Threat  
Extortion, Fighter, Militant, Soldier, Rebel

2. If, during your client conversations, he or she uses any of these phrases, it should alert the attorney to a potential material support issue.

**b. Research the location where the client claims persecution.**

i. Many of the Tier I and Tier II terrorist organizations have information available online. Many of the terrorist organizations have specific uniforms, and areas of geographic operations. If your client lived outside of these areas, it will bolster his or her case, disproving any claims of material support if the attorney can provide the material support showing the distance between the client and the active terrorist groups in his or her geographic area.

ii. Removing doubt from the Asylum Officer's or Immigration Judge's mind requires proof contrary to the presumption that the client, if living in certain areas, encountered terrorist groups. Enlist the client's help in proving lack of encounters:

1. Factors such as:

a. Education:

i. Most educated people do not live in rural areas, where some terrorist groups are known to operate

b. Profession:

i. Some professions, such as economists, would rarely encounter terrorist organizations

c. Family:

i. Some cultures forbid women from talking to strangers.

**c. Explore with the client any suspicion that you believe will raise security concerns about your client being a**

**danger to the United States.**

i. DHS examines all asylum applicant cases to see whether they are a danger to the nation, regardless of whether the material support issue exists. Should DHS have any doubts regarding the client being a danger, the client will lose his or her opportunity to apply for either asylum or the material support relief. Some clients do not realize that their activities, which may be only directed towards some group not associated with the United States, will be considered participating in terrorist activities and a danger to the United States.

ii. The best approach is a comprehensive interview with the client asking about his or her associations, spouse's affiliations, and any activities that could possibly flag the client.

**THE MATERIAL SUPPORT RELIEF PROCESS**

**2. Use this stage when it is fairly certain that the client provided material support to a terrorist organization.**

**a. Identify the organization:**

*i. No Duress Exemption Required:*

- Karen National Union/Karen National Liberation Army ("KNU/KNLA")
- Chin National Front/Chin National Army ("CNF/CNA") Chi National League for Democracy ("CNLD")
- Kayan New Land Party ("KNLP")
- Arakan Liberation Party ("ALP")
- Tibetan Mustangs
- Cuban Alzados
- Karenni National Progressive Party ("KNPP").

1. If the client gave material support to any of these organizations, then the attorney may go directly to step 3.

*ii. Duress Exemption Will be Required:*

1. TIER I/II Terrorist Organizations:

a. F.A.R.C.

i. This is the only terrorist organization allowed an exemption.

2. TIER III Undesignated Organizations:

a. Organizations that could be considered terrorists under INA §212(a)(3)(B)(iv)(vi)(III).

*iii. No Material Support Exemption Available:*

1. Any organization not mentioned above:

- a. As of writing, the client is barred from applying for asylum
- b. This stage may end the client's asylum

journey if he or she has knowingly given material support to a non-exempted terrorist organization.

**b. Full Disclosure Required:**

- i. Should the attorney believe that the client qualifies for the material support exemption, DHS requires that any submission for this relief must be accompanied by a full and complete disclosure of “the nature and circumstances of each provision of material support.”<sup>59</sup>
- ii. Attorney should assist the client in documenting the circumstances.

**c. Begin Duress Analysis:**

- i. Duress involves these three factors:
  1. Imminent threat of death or serious bodily injury
  2. A well-grounded fear that the threat will be carried out
  3. No reasonable opportunity to escape the threatened harm
- ii. The client must give a detailed explanation as to what occurred, involving all three factors:
  1. The client’s story must be consistent, plausible and believable.
  2. Details that bring the Asylum Officer or Immigration Judge into the picture are crucial to the duress analysis:
    - a. Ask the basic “who, what, when, where and why” questions.
    - b. Have the client give his story using the detailed facts:
      - i. For example: “In December 2006, my wife, children, and I were having our standard lunch of boiled chicken and peanuts when these armed men stormed into our house and held their rifle against my daughter’s head. They said that if we didn’t give them the chickens that we kept in our farm, they would kill my daughter and take my sons into their group.”
      - ii. Here, there is a threat to a life that seems imminent, by people who look as if they would carry it out if the client did not comply. Additionally, the client and his family were detained by threat of force, and there was no reasonable avenue of escape. This small story meets all of the duress elements.
- iii. In instances where the client gives material support over a longer period, such as a farmer in a guerilla infested area where he is paying “war taxes” monthly, the client will need to show why he or she did not try to escape or remove himself or herself from the danger.

1. For example:

- a. Guerillas surrounded the area and thus, the family could not exit
- b. Natural barriers such as high water rivers during the monsoon season existed
- c. Lack of transportation

**d. Begin Totality of the Circumstances Analysis:**

- i. .DHS has the discretion to deny the material support relief simply because it does not find that the client’s duress justifies the exemption.
- ii. At this writing, two factors will quickly eliminate the client as a potential asylee:
  1. DHS believes that the client gave material support voluntarily:
    - For example: the terrorists only collected their fees by mail and the client never encountered the group directly.
  2. DHS believes that the client, because of the duration of support given, was receiving benefits from the relationship with the terrorist organization instead of simply cooperating to protect his or her life, limb, and property. In *Arias v. Gonzales*, the client continued to pay the F.A.R.C. because “the money was good” where he was working.
- iii. When the practitioner is confident that the elements in the checklist are well documented, he or she must then submit an I-589 Form, and specifically claim the material support exemption, if it is warranted.

**CONCLUSION**

Denied by the thousands, individuals who applied for asylum after the passage of the PATRIOT Act and REAL ID Act up to early 2007, faced a Congressional majority convinced that this group of worthy beneficiaries was a dangerous threat to the United States. As a nation, the United States had “strained out the gnat, yet swallowed the camel.”<sup>60</sup> Providentially, in the very legislation that denies asylum to so many, a paragraph that presents some hope exists. Obtaining this relief is a precarious balancing act, and any misstep will destroy the applicant’s chance of entry. Representation is crucial to help those who are not terrorists but are indeed terrorized, gain access to this narrow exemption. Only then, can asylum seekers walk the tightrope.

## ENDNOTES

\*Craig R. Novak is a law clerk at Roy Petty, PC, Dallas. Novak received his J.D. from Texas Wesleyan University School of Law in 2008, where he was a staff member of its Law Review. Novak has a Master's in Public Administration and a B.A. from the George Washington University.

<sup>1</sup> Regina Germain, *Rushing to Judgment: The Unintended Consequences of the USA PATRIOT Act for Bona Fide Refugees*, 16 GEO. IMMIGR. L.J. 505, 505 (2002).

<sup>2</sup> *Id.* at 505-06.

<sup>3</sup> *Id.* at 506.

<sup>4</sup> *Id.*

<sup>5</sup> *Id.*

<sup>6</sup> Germain, *supra* note 1, at 515.

<sup>7</sup> See generally Real ID Act, 8 U.S.C. § 1182 (2005) (stating that Tier I terrorists are the groups most likely to disrupt the United States, while Tier II terrorists are less threatening to the country).

<sup>8</sup> U.S. Dep't of Homeland Security, U.S. Citizenship & Immigr. Servs., Office of Communications, Fact Sheet (May 10, 2007), <http://www.uscis.gov/files/pressrelease/Sec212Authority051007.pdf> (illustrating the Terrorist Organization Tier designations).

<sup>9</sup> Real ID Act, 8 U.S.C. § 1182 (2005) (describing the terrorist organizations identified as a threat to the United States government).

<sup>10</sup> R. Brent Wisner, *Shifting Borders: Immigration, Refugee and Asylum Matters and Public Policy: Asylum Denied: Seeking Asylum in the Age of Terrorism Interview with Bill Frelick, Human Rights Watch*, 12 GEO. PUB. POL'Y REV. 21, 23 (2007); See also Barbara Hines, *An Overview of U.S. Immigration Law and Policy Since 9/11*, 12 TEX. HISP. J. L. & POL'Y 9, 12 (2006) (discussing where an African National Congress anti-apartheid activities would ban members under the PATRIOT Act).

<sup>11</sup> Germain, *supra* note 1, at 518-19.

<sup>12</sup> 151 Cong. Rec. H453, 1-2, 21 (daily ed. Feb. 9, 2005) (statements of Rep. Sensenbrenner, Rep. Norton).

<sup>13</sup> *Id.* at 2, 11 (statements of Rep. Sensenbrenner, Rep. Pence).

<sup>14</sup> Ira J. Kurzban, *Immigration Law Sourcebook: A Comprehensive Outline and Reference Tool*, 13 Am. Immigr. Law Found., 20-23 (10th Ed. 2006).

<sup>15</sup> *Id.*

<sup>16</sup> *Id.*

<sup>17</sup> *Id.*

<sup>18</sup> 151 Cong. Rec. H453, *supra* at note 12 (statement of Rep. Hostettler).

<sup>19</sup> Representatives opposed to the REAL-ID asylum provisions believed that a less draconian immigration law could be passed without diminishing National Security. See *Cheema v. Ashcroft*, 383 F.3d 848, 458-60 (9th Cir. 2004) (pointing out the comments by Rep. Shiela Jackson-Lee, "[w]hat about the Cubans? What about the Haitians, the Liberians, the Sudanese, the Bosnians? What about those fleeing, as my colleague has indicated our Jewish individuals who were fleeing persecution? I simply say that we have a better way of doing this").

<sup>20</sup> *Id.* at 854-57.

<sup>21</sup> See *In Re S-K*, 23 I. & N. Dec. 936 Interim Decision 3534, 943-44 (BIA 2006) (discussing an alien's making of a donation to a terrorist organization, and not elaborating the mens rea for that intent).

<sup>22</sup> Wisner, *supra* note 10, at 24.

<sup>23</sup> *Id.* at 938-39.

<sup>24</sup> *Id.*

<sup>25</sup> *Singh-Kaur v. Ashcroft*, 385 F.3d 293, 298 (3d Cir. 2004) (explaining that no language in the statute limits 'material support' to the enumerated examples in the statute).

<sup>26</sup> Anwen Hughes, *Asylum and Withholding of Removal—A Brief Overview of the Substantive Law*, 10769 Practicing Law Inst. 217, 235 (2007).

<sup>27</sup> *Singh-Kaur*, 385 F.3d at 296.

<sup>28</sup> *Cheema*, 383 F.3d at 854.

<sup>29</sup> Wisner, *supra* note 10, at 24.

<sup>30</sup> *Id.*

<sup>31</sup> *Cheema*, 383 F.3d at 856.

<sup>32</sup> DAVID A. MARTIN ET AL., FORCED MIGRATION: LAW AND POLICY 91 (West 2007).

<sup>33</sup> U.S. Dep't of Homeland Security, Office of Immigr. Statistics, Policy Directorate, Annual Flow Report May 2007: Refugees and Asylees: 2006, May 2007, [http://www.dhs.gov/xlibrary/assets/statistics/publications/Refugee\\_AsyleeSec508Compliant.pdf](http://www.dhs.gov/xlibrary/assets/statistics/publications/Refugee_AsyleeSec508Compliant.pdf). (showing that both the number of immigrants applying for asylum and the government's granting of those asylum cases actually presented, have dropped).

<sup>34</sup> *Id.* at 1.

<sup>35</sup> *Id.* at 4.

<sup>36</sup> *Id.*

<sup>37</sup> Mark Fleming ed. et AL., *Unintended Consequences: Refugee Victims of the War on Terror*, 37 GEO. J. INT'L 759, 763-78 (2006).

<sup>38</sup> *Id.* at 774.

<sup>39</sup> *Id.* at 767.

<sup>40</sup> *Id.* at 780.

<sup>41</sup> *Id.* at 784.

<sup>42</sup> *Id.* at 765.

<sup>43</sup> U.S. Dep't of Homeland Security, U.S. Citizenship & Immigr. Servs., Office of Commc'ns, Factsheet, USCIS Implements Authority to Exempt Certain Persons Who Provided Material Support Under Duress to the Revolutionary Armed Forces of Colombia (F.A.R.C.) (Sept. 26, 2007), [http://www.uscis.gov/files/pressrelease/MaterialSupportFS\\_26Sep07.pdf](http://www.uscis.gov/files/pressrelease/MaterialSupportFS_26Sep07.pdf).

<sup>44</sup> U.S. Dep't of Homeland Security, Office of Director, U.S. Citizenship & Immigr. Svs. Interoffice Memorandum, Processing the Discretionary Exemption to the Inadmissibility Ground for Providing Material Support to Certain Terrorist Organizations (May 24, 2007), [http://www.uscis.gov/files/pressrelease/MaterialSupport\\_24May07.pdf](http://www.uscis.gov/files/pressrelease/MaterialSupport_24May07.pdf).

<sup>45</sup> *Id.*

<sup>46</sup> *Id.*

<sup>47</sup> *Id.*

<sup>48</sup> See Exercise of Authority Under Sec. 212(d)(3)(B)(i) of the Immigration and Nationality Act, 72 F.R. 26,138, 26,138-02 (May 8, 2007) (Stating that applicants must prove that the material support that they gave to the terrorist organizations be made under duress).

<sup>49</sup> U.S. Dep't of Homeland Security, U.S. Citizenship & Immigr. Servs., Processing the Discretionary Exemption to the Inadmissibility Ground for Providing Material Support to Certain Terrorist Organizations (May 24, 2007), [http://www.uscis.gov/files/pressrelease/MaterialSupport\\_24May07.pdf](http://www.uscis.gov/files/pressrelease/MaterialSupport_24May07.pdf).

<sup>50</sup> *United States v. Contento-Pachon*, 723 F.2d 691, 693 (9th Cir. 1984) (stating that there was sufficient evidence of duress to present a triable issue of fact when the defendant's life and family's lives were threatened if defendant did not transport narcotics).

<sup>51</sup> *Arias v. Gonzales*, 143 F. App'x 464, 467 (3d Cir. 2005) (stating that Arias was not threatened to make payments to FARC, therefore the duress defense was unsupported).

<sup>52</sup> *Id.*

<sup>53</sup> *Id.* at 468.

<sup>54</sup> WAS Interoffice Memorandum, *supra* note 44, at 5.

<sup>55</sup> *Breyer v. Ashcroft*, 350 F.3d 327, 328-31 (3d Cir. 2003) (the court discussing, after looking at the totality of the circumstances, that Breyer did not want to be a Nazi soldier, although he refused, and was obligated to stay for the duration of the war, whether he voluntarily enlisted or not).

<sup>56</sup> *Id.* at 335-35.

<sup>57</sup> *Id.* at 336-38.

<sup>58</sup> Interoffice Memorandum, *supra* note 44, at 6.

<sup>59</sup> Exercise of Authority, *supra* note 48, at 26138-01.

<sup>60</sup> Matthew 23:24 (New American Standard Bible) (statement by Jesus Christ to the Pharisees criticizing their hypocrisy and their willful disregard of the Law's (Torah) provisions of justice and mercy).

# THE DEATH PENALTY IN AMERICA: RIDING THE TROJAN HORSE OF THE CIVIL WAR

By  
Michael Brazao\*

## INTRODUCTION

After the end of the Civil War, slavery was formally abolished, and the right to vote and other civil rights for African-Americans were finally enshrined into the Constitution of the United States via the Reconstruction Amendments. However, such a narrow reading of the history of this period belies the nebulous boundary between “war” and peace. As Yoram Din-stein has noted, “[t]he phrase ‘war’ lends itself to manifold uses. . . [and thus] may appear to be a flexible expression suitable for an allusion to any serious strife, struggle or campaign.”<sup>1</sup>

This expansive notion of war is appropriate for describing African-Americans’ arduous path as they have struggled to achieve the status of equal human beings endowed with full civil rights. This paper will examine how public officials with Confederate sympathies in the postwar South managed to preserve, in law and in practice, many of the badges of slavery that had ostensibly been eradicated by the Reconstruction Amendments and the early Civil Rights Acts; and will do so with specific reference to racial disparities imposed by the death penalty.<sup>2</sup> Under our modern legal system, “much has remained consistent in the administration of injustice for black ‘defendants’... [since] the age of slavery, when blacks had little to nothing in the way of legal recourse.”<sup>3</sup> Keeping in mind that capital punishment is an exercise of power over the powerless,<sup>4</sup> this article seeks to trace the lineage of this inequality by examining the historical symbiosis between the application of the death penalty and the legacies of slavery and apartheid in the United States.

The analysis of this paper will proceed in three parts. First, I will present a historical overview of the institution of slavery that will clarify how it entrenches a social caste system by reducing the slave to an object of property. Second, I will closely examine the period following the American Civil War to demonstrate how a faction of Southern public officials reestablished the domination of whites in the postbellum South by formally acknowledging civil rights for African-Americans while simultaneously continuing to subjugate them through both legal and quasi-legal channels. Third, I will analyze how capital punishment has played a central role in allowing America to retain the indelible stain of racial inequality long after the emancipation of the slaves, purported to fulfill the egalitarian promise upon which America was founded.

## I. THE LAW OF SLAVERY FROM ROME TO ANTEBELLUM AMERICA

### SLAVES AS PROPERTY UNDER ROMAN LAW

The institution of slavery reduces human beings to objects devoid of any protections against incursions upon their life, liberty, and dignity. In order to understand how slaves were owned in antebellum America, it is helpful to trace the lineage of the legal institution of ownership back to the concept of *do-*

*minium* that emerged in the late Republican period of Ancient Rome. *Dominium* “was the highest, the ultimate form of title to property, specifically distinguished from lesser types of property interest.”<sup>5</sup> Under *dominium*, “[t]he owner was lord and master of his property.”<sup>6</sup>

Slavery was widely practiced and deeply imbedded in the social order of Rome, and the distinction between slaves and free men was one of three constitutional elements of personhood under Roman law.<sup>7</sup> This distinction had enormous juridical consequences, as “in many ways slaves were regarded as property rather than as human beings.”<sup>8</sup> As with any other object of property falling under the rubric of *dominium*, they were “things”<sup>9</sup> without rights<sup>10</sup> that “could be acquired, owned and disposed of.”<sup>11</sup>

The concept of *dominium*, with its almost unlimited powers for the owner, was a means of keeping the ever-increasing slave population under control.<sup>12</sup> This explains the stripping of juridical protection for slaves under *dominium*,<sup>13</sup> which meant that “a master could do what he liked with his slave, over whom he had the power of life and death.”<sup>14</sup>

## THOMAS HOBBS’ INFLUENCE ON ENGLISH THOUGHT ON SLAVERY

Roman law was preserved throughout the Middle Ages via Justinian’s Digest<sup>15</sup> and other ancient documents, and ultimately formed the bedrock of most civil law systems that had developed in Continental Europe by the Sixteenth century. While the courts of England developed their own distinct brand of common law, Roman law was preserved by the English in their universities: for centuries, the elite establishments of Oxford and Cambridge taught exclusively Roman law and not common law. Against this backdrop, Seventeenth century political philosopher Thomas Hobbes published his *Leviathan*, “...a work which more than any other defined the character of modern politics.”<sup>16</sup> According to Hobbes, whose philosophical treatise was heavily influenced by classical jurisprudence, prior to the establishment of civil society, human beings existed in a state of nature.<sup>17</sup> In this state, all men enjoyed a common capacity for dominion over all things in the world, as well as over one another.<sup>18</sup> Although all men were formally equal in this environment, scarcity of resources and unchecked animalistic impulses meant that life was a perpetual war, where every man was enemy to every man.<sup>19</sup> The resulting quality of life was necessarily “solitary, poor, nasty, brutish, and short.”<sup>20</sup> For these reasons, Hobbes argued that it was imperative for humans to form social covenants, in which some men relinquished their natural dominion to a higher sovereign in exchange for peace and security.<sup>21</sup>

Hobbes postulated that these social covenants for establishing sovereign power of one human over another could be created either by acquisition (i.e., force)<sup>22</sup> or by institution (i.e., consent).<sup>23</sup> He described two ways of acquiring power by force: (1) by generation, “when a man maketh his children”<sup>24</sup>; or (2) by

conquest, when a man “subdueth his enemies to his will.”<sup>25</sup> In contrast to sovereign power that is forcefully acquired, Hobbes theorized that sovereign authority could also be instituted when men freely consent to give a higher authority - i.e. the state - the power and responsibility to ensure peace and security.<sup>26</sup> The most obvious and direct mechanism through which a state pursues this mandate is the criminal law.<sup>27</sup> Hobbes was convinced that the quality of the sovereignty exercised by these two types of “commonwealths”<sup>28</sup> was “the very same.”<sup>29</sup> In this sense, a family was akin to a “little Monarchy,”<sup>30</sup> with the male head of the household exercising a despotic dominion over his underlings (including wives, children, and slaves) in the absence of any superseding authority. The power delegated to the resulting state often included the head of the family’s right to impose death upon his subjects.<sup>31</sup> Once sovereign power was authoritatively vested in the state, “the sovereign of each [state] hath dominion over all that reside therein,”<sup>32</sup> including the children and slaves of the men who convened the commonwealth, since “no man can obey two masters.”<sup>33</sup>

Thus, two central themes become clear from Hobbes’ oeuvre: power and inequality. Hobbes felt no qualms over limiting the liberty of some humans so that peace and prosperity could prevail for society as a whole. In his view, the sovereign power that some men exercised over others was merely a mutation of man’s natural right to self-defense,<sup>34</sup> for if a man did not subordinate his enemy, there was nothing in the state of nature to stop his enemy from killing him. In this way, “[v]iolence, as both a... fact and metaphor, [became] integral to the constitution of modern law.”<sup>35</sup> Such violence has the direct effect of sustaining inequality, since “[l]aw in its determining effect cannot be everything. Obviously, law must choose and elevate some modes of existence and suppress or ignore others.”<sup>36</sup>

#### **FROM ANTIQUITY TO AMERICA: THE ROMAN AND HOBBSIAN ROOTS OF AMERICAN SLAVERY**

William Blackstone, in his *Commentaries on the Laws of England*, expanded on the Hobbesian undertones of legal domination.<sup>37</sup> In one passage, he wrote:

[t]here is nothing which so generally strikes the imagination and engages the affections of mankind, as the right of property; or that sole and despotic dominion which one man claims and exercises over the external things of the world, in total exclusion of the right of any other individual in the universe.<sup>38</sup>

This domination was reaffirmed as a distinctly American institution when James Madison wrote approvingly of “that dominion which one man claims and exercises over the external things of the world, in exclusion of every other individual.”<sup>39</sup>

Premised upon the concept of dominion that emerged in Ancient Rome, slavery flourished in America for nearly a century after it was abolished in England.<sup>40</sup> Together, these closely related legal institutions perpetuated a stark disparity in the valuation of human life between white Americans and Afri-

can-Americans.<sup>41</sup> As Chief Justice Taney of the United States Supreme Court infamously stated in the *Dred Scott* decision, blacks were considered “so far inferior, that they had no rights which the white man was bound to respect.”<sup>42</sup> This dearth of rights for slaves was consistent with Hobbes’s idea that the dominant class needed to reinforce the normative social order against the specter of insubordination. In keeping with the Hobbesian premise that sovereign power will only be delegated to a

*Not only was capital punishment more prevalent in the South generally, but it “was a powerful tool for keeping the slave population in submission.”*

higher authority when the head of the household is incapable of maintaining peace, we would expect to see a rise in the application of sovereign state power in situations when the status quo is most threatened. This expectation is supported by the observation that for most of the history of American slavery, “the controlling factor in a slave’s life was not the legislation on the books but the master’s whim. Though slaves were occasionally

tried in courts and tribunals, the chattel slavery system gave slaveholders almost total control over their ‘property,’ including the manner in which slaves were punished.”<sup>43</sup> However, as the institution of slavery continued to face mounting pressure, both from within the United States and a fledgling international movement toward its abolition,<sup>44</sup> we see a gradual rise in the use of the law as a means of buttressing the American social hierarchy. Therefore, although evidence from early colonial times shows some instances of equality under the law, laws dealing with law-breaking slaves grew more stringent as the slave population increased and threats of slave insurrections rose. These ‘Slave Codes’ were extreme laws reflecting white supremacy and fear, and allowing slaves to be put to death for transgressions ranging from helping a fellow slave escaping to destroying property.<sup>45</sup>

Further evidence of the correlation between racially discriminatory penal practices and slavery is found in the higher preponderance of capital punishment in areas where slavery was most integral to the local economy. Thus, we see that from a very early point in the colonial period, northern colonies, who had never been as reliant on plantation-based agriculture as the southern colonies, adopted much more lenient attitudes toward capital punishment,<sup>46</sup> while “[i]n the South, capital punishment had a different history linked, in large part, to slavery.”<sup>47</sup> Not only was capital punishment more prevalent in the South generally, but it “was a powerful tool for keeping the slave population in submission.”<sup>48</sup> This was in part due to the perceived need to control them as they were not only a captive workforce, but also made up significant portions of the populations of many southern states.<sup>49</sup>

As the above examples demonstrate, “[c]apital punishment during this time... [embodied] an ‘emphatic display of power, a reminder of what the state could do to those who broke the laws.’”<sup>50</sup> The most brutal and extreme exhibitions of emphatic state power were almost always reserved for the subjugated classes, who had the most to gain from a disruption of the social status quo and the least to lose should their efforts be thwarted. Therefore, in an attempt to ratchet up the deterrent

value of criminal power against potential insurrection, “many executions were ‘intensified’ through extreme methods such as burning at the stake, dismemberment, dissection, and public display of bodies after death;”<sup>51</sup> barbarous tactics that were usually, if not always, reserved for blacks.<sup>52</sup> In fact, offences by slaves against their masters for crimes of “petit treason”<sup>53</sup> were often brutally punished in a manner quite similar to those convicted of treason against the state.

The disparity in the application of capital punishment between the northern and southern regions of America continued to widen in the decades leading up to the Civil War. Early movements in the 18<sup>th</sup> century to abolish or restrict the death penalty<sup>54</sup> “were mostly concentrated in northern states,”<sup>55</sup> and formed part of a broader movement toward the “rejection of other social institutions such as slavery.”<sup>56</sup> This trend continued well into the Nineteenth century, when “[l]aws in northern states were ‘all in the direction of abolition’ from the 1820s through the 1850s.”<sup>57</sup> At the same time, the abolitionist cause was much more attenuated in the South. “This owed itself partly to the institution of slavery, which was firmly in place in the South until after the Civil War.”<sup>58</sup> Even where modest abolitionist trends were observed in the South, the death penalty retained a distinctly racial flavor. “No southern states abolished capital punishment completely, but every southern state did eliminate it for some crimes committed by whites.”<sup>59</sup> Moreover, “in southern states, capital punishment was still used for crimes related to spreading discontent among free black people, insubordination among slaves, and even attempted rape by a black person against a white person.”<sup>60</sup>

The disparity between northern and southern states is also visible in the differing pace at which executions ceased to be conducted as public spectacles. Whereas “from 1830 to 1860, every Northern state... moved its public hangings indoors” in response to a concern that public executions fostered “occasions for rioting, revelry and ribaldry,”<sup>61</sup> the abolition of public executions took much longer in the South, with the last public execution occurring in 1936 in Kentucky.<sup>62</sup> Because public executions were believed to engender licentiousness, “[p]erceptions of unruly crowds meant public executions were no longer perceived as legitimate exercises of state power nor mechanisms to deliver a message of lawful retribution.”<sup>63</sup> This posed a much greater problem for southern authorities, who relied more heavily on public executions to serve as a manifestation of force and pedagogy of power in order to secure their inequitable social hierarchies.<sup>64</sup> Thus, it would be more difficult for southern authorities to accept that public executions had a futile (or worse, a detrimental) effect on public order, since the public execution was so integral to the state’s “display of the majestic, awesome power of sovereignty.”<sup>65</sup>

By the 1860s, it was apparent that the abyss between northern and southern states on the issue of slavery had become so entrenched that a war was inevitable. The ultimate “victory” of Union forces on the battlefield, however, would prove to be a Pyrrhic victory in the struggle for equality.

## II. THE WAR THAT DIDN’T END

### THE RESISTANCE AGAINST RECONSTRUCTION

The surrender of the Confederate army in the Spring of 1865 marked the formal end of the American Civil War and ushered in the Reconstruction period of American history. While it is generally conceded that “[t]he Confederate generals surrendered honorably... the spirit of the South was hardly defeated. Slavery was gone, but the idea of states’ rights and autonomy survived.”<sup>66</sup> The indomitable spirit of the Confederacy was apparent immediately following its surrender to Union forces. In 1865, pending re-admission to the Union, every southern state passed a series of “Black Codes” that purported to reduce freed slaves to second class citizenship and give whites “some of the control of blacks they had during slavery.”<sup>67</sup> Such thinly-veiled attempts at reintroducing slavery through the juridical back door were met with swift action after the 1866 federal election yielded a Congress devoted to the agenda of “Radical Reconstruction.”

Under the doctrine of Radical Reconstruction, the federal government sought to ensure the adherence of recalcitrant southern authorities to the letter and spirit of the Reconstruction

Amendments, which formally abolished slavery and extended voting and other civil rights to black freedmen. In order to ensure compliance, Congress passed the Reconstruction Acts of 1867, placing the South under federal military control.<sup>68</sup> It was under the authority of this martial law that freed slaves were registered to vote. The ensuing elections saw a handful of blacks elected to Congress, as well as sizeable black constituencies (and in some cases, majorities) elected to state public office.<sup>69</sup>

As one can imagine, the federal laws passed immediately after the Civil War

“had effected a complete revolution in [American] constitutional jurisprudence by transferring from the states to the United States [responsibility over] all the fundamental rights of citizens – their life, their liberty, and their property.”<sup>70</sup> Such a massive change from the antebellum power dynamic in the South was met with considerable opposition by the recently deposed southern white establishment, who resented this complete rewriting of the “racial contract” upon which America had been founded.<sup>71</sup> Such resentment was exacerbated by the perceived “fervor with which Reconstruction Republicans set about the legislative remodeling” through legislative instruments “drawn in sweeping language appropriate to the federal government’s new-found sense of power.”<sup>72</sup>

### THE NEW DEPARTURE: THE TROJAN HORSE OF RACE RELATIONS IN AMERICA

The short-term effectiveness of Radical Reconstruction in ensuring the right to vote and civil rights for blacks was a humiliating blow to the supremacy of the white southern establishment after the Civil War. Having recently faced military defeat through both the loss of the Civil War and the failure to resist the presence of federal troops during Radical Reconstruction, any hope for resurrecting a semblance of antebellum domi-

*In 1865, pending re-admission to the Union, every southern state passed a series of “Black Codes” that purported to reduce freed slaves to second class citizenship and give whites “some of the control of blacks they had during slavery.”*

nation required the adoption of a radical new strategy against an overbearing, even suffocating, federal presence. This article suggests that, at this point in American history, southern jurists adopted a strategy of apparent acceptance of the Reconstruction agenda that actually allowed many badges of slavery to persist in relatively undiluted form.

Southern authorities appear to have modeled their approach to restoring the antebellum status quo on a Roman precedent. In the *Aeneid*, famed Roman poet Virgil recounts the legendary story of how Rome was founded. One episode from this epic has since gained almost universal recognition in Western society: the “Trojan Horse” used by the Greeks during their long siege upon the city of Troy. The Greek army, whose “strength [was] broken in warfare” after many years of futile hostilities,<sup>73</sup> offered the colossal wooden horse as a gift. The Trojans accepted the horse as a token of peace and surrender, and brought it within their city’s walls.<sup>74</sup> Later that night, as the Trojans slept, the horse “opened wide” and “emitted men,”<sup>75</sup> who stole into the darkened city, “[l]et in their fellow soldiers at the gate, [a]nd joined their combat companies as planned.”<sup>76</sup> This parable is instructive in understanding how the southern authorities regained the upper hand in the ongoing war for political supremacy in the postbellum South.

As the Greeks realized in the *Aeneid*, the Southern establishment understood that they did not have sufficient military prowess to achieve their objectives through all-out war. Thus, a new, less belligerent approach was needed to continue the struggle for “states’ rights.” This strategy was first employed by a faction of southern Democrats known as “Redeemers,” whose primary political objective was the return of political sovereignty to the southern states through cooperation with and concession to the federal government and the North.<sup>77</sup> The Redeemers gradually gained control of the party agenda through the implementation of a “New Departure” tactic, whereby the emphasis of political dialogue was shifted away from suffrage and civil rights to economic and other less controversial matters. The movement became so successful that within four years, all Democrats and most northern Republicans agreed that Confederate nationalism and slavery were dead and further federal military interference was unnecessary.<sup>78</sup> By 1870, the Democratic–Conservative leadership across the South decided it had to end its opposition to Reconstruction as well as to black suffrage in order to survive and move on to new issues.<sup>79</sup>

Like the Trojans, whose readiness to accept the Horse was likely prompted by a desire to end a seemingly endless war with little prospect of victory in sight, the willingness of southern Democrats to suddenly surrender on such a major bone of political contention was welcomed by a beleaguered Republican party yearning to turn the page on this chapter of American political history.<sup>80</sup> The South’s willingness to accept the new constitutional reality convinced the Republicans to adopt a let-alone policy toward the South.<sup>81</sup> The goal of the New Departure was ultimately achieved in the Compromise of 1877, whereby The South agreed to accept the hotly-disputed victory of Republican presidential candidate Rutherford Hayes in the election one year earlier, if he agreed to withdraw the last of the federal troops from their states.<sup>82</sup> At that point, all sides agreed that Reconstruction was finished.<sup>83</sup>

Hobbes wrote, “war consists not in battle only, or the act of fighting; but in a tract of time, wherein the will to contend by battle is sufficiently known.”<sup>84</sup> With those words in mind we understand how, in the course of Reconstruction, a hotly contested Civil War morphed into a cold war fought along political and juridical fronts. With the perfection of the New Departure in 1877, it became clear that the courts were the new battlefield.<sup>85</sup> Future grievances between the North and the South would be governed by the rule of law and the requirements of due process. What remained to be seen was the extent to which the Supreme Court and Congress would go to eliminate the social implications of slavery and racial discrimination.<sup>86</sup> As African-Americans would soon learn, neither would go very far.

The Supreme Court set the tone when it released a series of decisions that gradually overturned much of the Reconstruction civil rights legislation. Beginning with the *Civil Rights Cases*<sup>87</sup> of 1883, it held that the Fourteenth Amendment only gave Congress the power to outlaw public, not private, discrimination.<sup>88</sup> The Court reinforced this ruling with *Plessy v. Ferguson*<sup>89</sup> in 1896, announcing that state-mandated segregation was legal as long as the law provided for “separate but equal” facilities. As a result, “[t]he strict limitation of the postbellum amendments to state action expresse[d] the view called ‘states’ rights’ – the very position that the South fought for in the Civil War, which had ostensibly been repudiated not only by the war but also by the Thirteenth, Fourteenth, and Fifteenth Amendments, as well as the civil rights acts of 1866 and of 1875.”<sup>90</sup>

This laissez-faire line of Supreme Court jurisprudence permitted state courts to follow suit. They enforced a wide range of postwar “Jim Crow Laws” that transformed the South into a virtual apartheid state, where African-Americans became second-class citizens continuing to bear many badges of the slavery from which they had supposedly been emancipated. While varying widely in their disregard of the Reconstruction Amendments,<sup>91</sup> what these laws had in common was “[t]hrough these means, the neutrality of the liberal state was formally upheld, as demanded by the social contract, without in any significant way challenging the racial polity.”<sup>92</sup> Indeed, so striking was the ability of southern authorities to retain the essence of slavery through their juridical institutions, that “[i]f you look at the subsequent history of the United States, there is some truth in the paradoxical statement that the Confederacy was born when Lee handed Grant his sword.”<sup>93</sup>

### III. CAPITAL PUNISHMENT’S ROLE IN EXTENDING THE BADGES OF SLAVERY

#### LYNCHING AS A CONTINUATION OF WHITE DOMINION

The central premise for the Compromise of 1877 was the understanding that Southern lawmakers would formally adhere to the aims of Reconstruction. Thus, the art of the New Departure and its Jim Crow Laws was in how they spawned an entire movement allowing sovereignty over the South to be wrested from the federal government and returned to local white hands without appearing to violate the postbellum Constitution. Once this repatriation of sovereign control was complete, the subjugation of blacks resumed with zeal and was hindered only by a need to outwardly conform to due

process. One stark example of this phenomenon was the proliferation of lynching that occurred at the hands of local mobs. While it is generally conceded that the practice of lynching far predates the Civil War,<sup>94</sup> it has also been observed that prior to that conflict “only rarely were the punishments imposed under what had come to be known as ‘Lynch’s Law’ specifically capital,”<sup>95</sup> and it was only after Reconstruction that “the term ‘lynching’ c[a]me to acquire its contemporary connotations,... the targeting of African-Americans, and, more specifically, African-American men, chiefly in the South, and the absence of the due process of law.”<sup>96</sup>

That the widespread lynching of blacks began its ascent following the New Departure is no coincidence. Rather, this trend served as a useful “means of reaffirming an endangered form of white... identity... [and] a lethal means of regenerating the racial contract once the racial polity could no longer be secured through the institution of chattel slavery.”<sup>97</sup> “Lynchings were characterized by their celebratory and public nature, their brutal method of killing, their disregard for any semblance of due process for the accused, and an absence of punishment for the killers.”<sup>98</sup> By restoring the antebellum dichotomy between racial classes<sup>99</sup> and affirming life-or-death sovereignty of white males over blacks, “lynching provided a *de facto* extralegal restoration of the antebellum Black Codes.”<sup>100</sup>

In order for the application of lynch law to survive the scrutiny of the Supreme Court, it was imperative that lynching cloak itself in the Court’s language condoning “private” discrimination. Southern law enforcement claimed that the state did not perpetuate the violence. This fiction was enough to shield lynching from the scrutiny of the federal courts, since they had no jurisdiction to intervene on the mere grounds that state police and prosecutors were failing to solve crimes. For these reasons, “conventional definitions of lynching [typically] ...draw a sharp line of demarcation between violence inflicted in the name of the law and that which stands outside or in violation of the law.”<sup>101</sup>

Nonetheless, a brief peek under the hood of this ruse reveals the reality of state participation in these supposedly “private” acts. “[A]s the very phrase ‘lynch law’ implies... the mutually exclusive opposition between the legal and the illegal fails to appreciate how unstable and often irrelevant was the liberal formulation of the distinction between the official and unofficial, public and private, in the conduct of lynching.”<sup>102</sup> The complicity of southern public officials in lynchings was entrenched by the refusal of southern senators in the United States Congress to endorse an anti-lynching bill that would allow federal law enforcement officials to investigate and prosecute lynchings when local authorities failed to intervene.<sup>103</sup> Although no less than seven presidents had requested such a law from Congress, and the House of Representatives had passed an anti-lynching bill four times, “the Senate’s powerful southern senators used the filibuster to ensure that the bill never got a vote.”<sup>104</sup> Once again, we see the *modus operandi* of the New Departure at work; southern lawmakers could invoke the democratic principle of legislative due process to perpetuate a racist legacy passed down from the antebellum era.

Recent scholarship has challenged the conventional depiction of lynch law:

[M]any lynchings should be classified not as irrational deeds perpetrated by mobs of private persons, acting without legal authority but, rather, as ritualized enactments that drew their authority from the unwritten racial contract of the white community and that patterned their proceedings, to a greater or lesser extent, on the very judicial procedures they are characteristically said to flout.<sup>105</sup>

This argument maintains that the public spectacle lynchings of African-Americans by whites in the post-Reconstruction era “should be located not in the domain of the illegal or the extralegal but, rather, near the heart of a more comprehensive structure of racial control, one that vested informal police powers in members of the white race and that encouraged vigilantism as a necessary complement to its weak agencies of formally authorized political discipline.”<sup>106</sup>

#### THE DEATH PENALTY AS A “LEGAL LYNCHING”

While it is true that no region in America has displayed a historical monopoly over capital punishment, it is also true that “[d]eath penalty practice in America is highly regionalized.”<sup>107</sup> The plain fact of the matter is that “[m]ost modern executions occur in the South,”<sup>108</sup> where “the death penalty is as firmly entrenched as grits for breakfast.”<sup>109</sup> This pronounced regional disparity means that it is impossible to speak of an American

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*The plain fact of the matter is that “[m]ost modern executions occur in the South,”<sup>108</sup> where “the death penalty is as firmly entrenched as grits for breakfast.”*

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pattern or single national profile regarding capital punishment.<sup>110</sup> This regionalization shares a close historical affinity with the institution of slavery, and its disproportionate application against blacks in the modern era is a vestige of the dominion historically enjoyed by the white elite establishment over blacks.

A historical examination of capital punishment in America reveals its provocative correlation with lynching.<sup>111</sup> The incidence of racially-motivated lynchings, which rose to prominence after Reconstruction, declined steadily from a peak in the 1890s and disappeared (or at least went into hiding)<sup>112</sup> by the 1940s-1950s.<sup>113</sup> Despite this apparent success at eradicating racial violence, however, a judicial analogue had been created in its place. “With these ‘legal lynchings,’ whites deferred to the courts but remained ready to return to mob justice if the results were not favorable to them.”<sup>114</sup> In this way, institutionalized racial violence against African-Americans was able to persist to a great degree.<sup>115</sup> For example, over half (54%) of citizens executed between 1930 and 1967 were African-American,<sup>116</sup> despite never comprising more than 11% of the American population during that time,<sup>117</sup> and three out of five executions during that



time took place in the southern states,<sup>118</sup> where 90% of those executed for rape, 100% of those executed for burglary, and 83% executed for armed robbery, were black.<sup>119</sup> Throughout that period, blacks never consisted of more than 25% of the population of the South.<sup>120</sup>

This statistical trend is faithful to the Redeemers' strategy of weaving antebellum attitudes into the fabric of democratic institutions. Because legislatures and courts were enacting and applying facially neutral laws, the law provided a gloss of "stability and regularity"<sup>121</sup> that was absent in the context of mob lynchings. The genius of these legal lynchings was in how they co-opted the Constitution itself—specifically, the division of powers doctrine, as the pursuit of criminal prosecutions has historically been understood as a matter of local concern—to shelter a racist institution.<sup>122</sup> Under the pretense of due process,<sup>123</sup> a legal apparatus was created that would "use force against its citizens without itself appearing like a criminal."<sup>124</sup> Much like the Greeks who attacked the city of Troy under cover of nightfall, these complicit agents worked "in a state of relative invisibility,"<sup>125</sup> fostered by an "epistemology of ignorance"<sup>126</sup> that deflected accusations of bias by pointing an exculpatory finger toward the incontrovertibly race-neutral language of the black-letter law.<sup>127</sup> As an end result, "[m]ore graphic forms of racial violence, such as spectacle lynching, became less imperative once white dominance was assured by less transparent but more calculable means,"<sup>128</sup> and with the passage of time the Confederacy's most enduring weapon in perpetuating the subordination of blacks as "subpersons"<sup>129</sup> has proven not to be the musket or the noose, but the gavel.<sup>130</sup>

The ability of the state to impose the death penalty completes this paradigm. "Along with the right to make war, the death penalty is the ultimate measure of sovereignty and the ultimate test of political power."<sup>131</sup> Thus, "[w]ith the end of slavery... [t]he belief that capital punishment was necessary to

restrain a primitive black population became an article of faith among white southerners lasting well into the twentieth century."<sup>132</sup> Because the death penalty treats "members of the human race as nonhumans, as objects to be toyed with and discarded,"<sup>133</sup> it is the ultimate manifestation of the ability of the state "to do anything it pleases with life,"<sup>134</sup> a direct Hobbesian descendant "of the personal power of kings."<sup>135</sup>

## CONCLUSION

The purpose of this analysis is not to illustrate that the American system of capital punishment system is tainted by race. Rather, by tracing the link between the current practice of capital punishment and the classical doctrine of dominion, it attempts to expose how the imposition of state-sanctioned death in contemporary America is marred by the indelible stain of slavery. Having been stealthily carried into modern jurisprudence via the Trojan Horse of the New Departure, the Hobbesian paradigm of a master wielding life-or-death dominion over his chattel remains a live concept in the American criminal justice system today, particularly in the South. Through its racially selective administration, the modern application of the death penalty represents one of the most enduring fronts in the struggle for legal equality, a vestige of a Civil War that purportedly ended nearly a century and a half ago.

## ENDNOTES

\* Bachelor of Arts (B.A., Psychology), the University of British Columbia (2001); Bachelor of Laws (LL.B.), McGill University (2005); Bachelor of Civil Law (B.C.L.), McGill University (2005); Master of Laws (LL.M.), Columbia University (2008). I would like to thank Tanya Greene, Esq., Adjunct Professor at the Institute for Research in African-American Studies at Columbia University, for her instruction, guidance, support and encouragement.

YORAM DINSTEIN, WAR, AGGRESSION AND SELF-DEFENCE 3 (3d ed. 2001) (noting, in popular language "references are frequently made to 'war against the traffic in narcotic drugs,' 'class war' or 'war of nerves'").

<sup>2</sup> See MATTHEW B. ROBINSON, DEATH NATION: THE EXPERTS EXPLAIN AMERICAN CAPITAL PUNISHMENT 109-15, 178-83 (Pearson Education Inc. 2008) (conducting a survey of 96 death penalty experts, of whom 84% agreed that the death penalty is "plagued by a racial bias" of some kind, and 80% of whom agreed that capital punishment was "plagued by a social class bias" of some kind); Stephen B. Bright, *Discrimination, Death and Denial: The Tolerance of Racial Discrimination in Infliction of the Death Penalty*, in FROM LYNCH MOBS TO THE KILLING STATE: RACE AND THE DEATH PENALTY IN AMERICA 221-28 (Charles J. Ogletree, Jr. & Austin Sarat eds., New York Univ. Press 2006) (providing an overview of how racism lingers in the contemporary criminal justice system); CHARLES J. OGLETREE, *Making Race Matter in Death Matters*, in FROM LYNCH MOBS TO THE KILLING STATE: RACE AND THE DEATH PENALTY IN AMERICA 61 (Charles J. Ogletree, Jr. & Austin Sarat eds., New York Univ. Press 2006) ("The application of death as a punishment for black Americans in unique and cruel forms throughout American history is undeniable. The underlying currents involved in this sordid history—fear, white supremacy, devaluation of black life, hatred, and a desire to control—may not be exact reasons for the suspicious disparities in capital punishment today, but one cannot help but wonder whether some of the same impulses are at work.").

<sup>3</sup> OGLETREE, *supra* note 2, at 56.

<sup>4</sup> Anne Norton, *After the Terror: Mortality, Equality, Fraternity*, in THE KILLING STATE: CAPITAL PUNISHMENT IN LAW, POLITICS, AND CULTURE 27 (Austin Sarat, ed., Oxford Univ. Press 1999).

<sup>5</sup> ANDREW BORKOWSKI, TEXTBOOK ON ROMAN LAW 146 (Blackstone Press Limited 1994).

<sup>6</sup> *Id.*

<sup>7</sup> See *id.* at 78 ("There were three constituent elements of status in Roman law—*libertas*, *civitas* and *familia*. The person of full status was the one who possessed all three elements: he had *libertas* (freedom) in that he was not a slave; he had *civitas* (citizenship) in that he was a citizen of Rome, not a foreigner; and he had *familia* ('family') in that he belonged to a Roman household. Loss of any or all of these elements resulted in *capitis diminutio* ('a loss of status'), the gravity of which depended on the circumstances").

<sup>8</sup> *Id.* at 79.

<sup>9</sup> *Id.* at 80.

<sup>10</sup> *Id.* at 79.

<sup>11</sup> BORKOWSKI, *supra* note 5, at 79 ("[T]heir human personality was recognized to some extent in law, however tenaciously Romans might have tried to adhere at times to the notion that a slave was simply a 'thing'").

<sup>12</sup> See *id.* at 80 (stating that the emergence of the institution of *dominium*, which vested a heightened concentration of prerogatives over all property in the hands of the owner, closely coincided with the rise of slavery as a social institution in the Roman Republic because "[t]he overall treatment of slaves varied from period to period. In early Rome it seems that slaves were generally treated well, possibly because they were relatively few in number. Their treatment deteriorated when Rome's overseas expansion began in the third century BC. Wars of conquest fought abroad resulted in the enslavement of large numbers of foreigners.").

<sup>13</sup> *Id.*

<sup>14</sup> *Id.* at 84.

<sup>15</sup> *See id.* at 87 (referencing the Digest, a comprehensive and massively influential compilation of jurisprudence that was issued by the Roman Emperor Justinian between 529 to 534 AD, and would later serve as the bedrock juridical authority for all civil law justice systems, comprising continental Europe as well as numerous overseas jurisdictions).

<sup>16</sup> THOMAS HOBBES, *LEVIATHAN: REVISED STUDENT EDITION* ix (Richard Tuck ed., Cambridge Univ. Press 1996).

<sup>17</sup> *See id.* at 89.

<sup>18</sup> *Id.*

<sup>19</sup> *Id.* at 120.

<sup>20</sup> *Id.*

<sup>21</sup> *Id.* at 121.

<sup>22</sup> HOBBES, *supra* note 16, at 121.

<sup>23</sup> *Id.*

<sup>24</sup> *See id.* (stating that humans gain such power because the helpless infant implicitly relinquishes its natural right to self-dominion in exchange for paternal protection).

<sup>25</sup> *See id.*

<sup>26</sup> *See id.* (suggesting that only free men had the power to delegate their personal sovereignty, since slaves, wives, and children were under the sovereignty of the male head of the household).

<sup>27</sup> GRAHAM PARKER, *AN INTRODUCTION TO CRIMINAL LAW* 51 (Methuen Publications 1977) (noting on the emergence of criminal law as a social control mechanism, “[t]he criminal law became a distinct legal entity – with its own special rules and procedures – when society wanted protection from antisocial acts that threatened internal security but could not be resolved by money payments or the chaotic private ‘justice’ of the feud. A central authority... assumed the role of protector of the people and guardian of the *status quo*”).

<sup>28</sup> HOBBES, *supra* note 16, at 121.

<sup>29</sup> *Id.* at 142.

<sup>30</sup> *Id.*

<sup>31</sup> JOSEPH A. MELUSKY & KEITH A. PESTO, *CRUEL AND UNUSUAL PUNISHMENT: RIGHTS AND LIBERTIES UNDER THE LAW* 35 (ABC-CLIO 2003).

<sup>32</sup> Hobbes, *supra* note 16, at 140.

<sup>33</sup> *Id.* at 139.

<sup>34</sup> *See* GEORGE P. FLETCHER, *THE GRAMMAR OF CRIMINAL LAW: VOLUME ONE: FOUNDATIONS* 26 (Oxford Univ. Press 2007) (“formal, public punishment grows out of the practice of self-defense by private individuals”).

<sup>35</sup> AUSTIN SARAT & THOMAS R. KEARNS, *INTRODUCTION TO LAW’S VIOLENCE* 1, 3, 7 (1992).

<sup>36</sup> PETER FITZPATRICK, “*Always More to Do*”: *Capital Punishment and the (De) Composition of Law*, in *THE KILLING STATE: CAPITAL PUNISHMENT IN LAW, POLITICS, AND CULTURE* 128-29 (Austin Sarat, ed., Oxford Univ. Press 1999).

<sup>37</sup> WILLIAM BLACKSTONE, *COMMENTARIES ON THE LAWS OF ENGLAND* (Banks & Brothers, Law 1892) (showing how the homogenization of early post-colonial legal attitudes was greatly facilitated by the singular reliance of nascent American lawmakers on this text, and in this, we see deep Hobbesian undertones as well as an explicit preservation, in pristine form, of the classical Roman concept of *dominium*).

<sup>38</sup> J.W. Harris, *Property and Justice* 29, 30 (1996).

<sup>39</sup> James Madison, *Parties*, *THE NATIONAL GAZETTE*, Jan. 23, 1792, *reprinted in* *IDEAS OF THE FIRST AMENDMENT* at 234 (Vincent Blasi ed., 2006).

<sup>40</sup> *See* RICHARD WILLIAM FOGEL & STANLEY L. ENGERMAN, *TIME ON A CROSS: THE ECONOMICS OF AMERICAN NEGRO SLAVERY* 33-34 (Univ. Press of America 1984) (stating that slavery was abolished in England in 1772).

<sup>41</sup> *See* OGLETREE, *supra* note 2, at 57 (describing how the harsh “Slave Codes” that prevailed prior to the Civil War revealed a “penchant for valuing white life over black life” indicating that blacks had few rights, formal or informal, during the “peculiar institution” of chattel slavery).

<sup>42</sup> *Dred Scott v. Sandford*, 60 U.S. 393, 407 (1857).

<sup>43</sup> OGLETREE, *supra* note 2, at 57.

<sup>44</sup> *See* Fogel, *supra* note 40.

<sup>45</sup> *Id.*

<sup>46</sup> ROBINSON, *supra* note 2, at 15.

<sup>47</sup> NINA RIVKIND AND STEVEN F. SHATZ, *CASES AND MATERIALS ON THE DEATH PENALTY* 23 (2d ed. 2005).

<sup>48</sup> *Id.* at 23-24 (“[i]n addition to punishing slave crimes with death, the Black Codes of many southern states differentiated between capital crimes for black slaves and white people. In the 1830’s, Virginia had five capital crimes for whites, but an estimated seventy capital crimes for black slaves. In 1848, the Virginia Assembly passed a law requiring the death penalty for black slaves for any offense punishable by three or more years imprisonment for whites. Racial

discrimination was also codified in Georgia’s rape statutes. In 1816, the death penalty was required for a slave or ‘freeman of colour’ who raped or attempted to rape a white female, and, at the same time, the state reduced the minimum sentence from seven to two years and removed the hard labor requirement for a white man convicted of rape. A white man convicted of raping a slave woman or a free woman of color was punished by a fine and/or imprisonment at the court’s discretion”).

<sup>49</sup> ROBINSON, *supra* note 2, at 15.

<sup>50</sup> *See* ROBINSON, *supra* note 2, at 15 (stating that in order to reinforce this message of awesome power, executions “had to be carried out in public, in a large space so that many people could witness it, and during the day”).

<sup>51</sup> *Id.* at 16.

<sup>52</sup> *See id.* (“burning was reserved only for slaves who committed crimes against their masters or plotted revolts, and women who murdered their husbands. Such offenses were considered disruptive to the social order, meaning burning was a method aimed at maintaining oppressive institutions such as slavery and even marriage”).

<sup>53</sup> Stuart Banner, *Traces of Slavery: Race and the Death Penalty in Historical Perspective*, in *From Lynch Mobs to the Killing State: Race and the Death Penalty in America* 96, 104 (Charles J. Ogletree, Jr. & Austin Sarat eds., 2006) (explaining that the Hobbesian pedigree for this similarity is evident when one considers that what these cases have in common is the reversal of the traditional hierarchy of the household. The legal name for such crimes, petit treason, suggests the strength of the analogy contemporaries drew between the household and state. Treason denoted ‘not only offences against the king and government, but also crimes ‘proceeding from the same principle of treachery in private life’. If treason, the subversion of the authority of the state, was the gravest of crimes, then petit treason, the subversion of the authority of the family, had to be punished especially harshly).

<sup>54</sup> ROBINSON, *supra* note 2, at 17.

<sup>55</sup> *Id.*

<sup>56</sup> *See* RIVKIND, *supra* note 47, at 24 (“This first wave of abolitionist activity occurred in the context of the reform movements for temperance, women’s rights, the abolitions of slavery, and better treatment of poor, imprisoned, and mentally ill people.” However, “The campaign against capital punishment lost momentum as slavery grew to dominate the reform agenda, and the anti-gallows movement was halted by the Civil War”).

<sup>57</sup> *See* ROBINSON, *supra* note 2, at 19 (“In 1837 Maine required a 1-year waiting period between death sentence and execution; after this time, the governor still had to sign a death warrant. The state executed no one between 1837 and 1863. Such laws were also passed in Vermont, New Hampshire, Massachusetts, and New York”).

<sup>58</sup> *Id.* at 20.

<sup>59</sup> *Id.*

<sup>60</sup> *Id.* at 19-20.

<sup>61</sup> *Id.* at 20.

<sup>62</sup> *Id.* at 22-23 (nothing that this move toward private execution foreshadowed the eventual practice of conducting executions in the middle of the night, either statutorily or by warden’s discretion, and that private executions were also partly necessitated by new inventions such as electrocution and the gas chamber).

<sup>63</sup> ROBINSON, *supra* note 2, at 21.

<sup>64</sup> *See id.* at 19 (“Public executions in early America were meant to amplify fear, reinforce order, and separate illegitimate, unacceptable violence by individuals from legitimate, acceptable violence committed by the state”).

<sup>65</sup> *Id.* (displaying how the public execution has “a juridico-political function. It is a ceremonial by which a momentarily injured sovereignty is reconstituted. It restores sovereignty by manifesting it at its most spectacular... There must be an emphatic affirmation of power and its intrinsic superiority. And this superiority is not simply that of right, but that of the physical strength of the sovereign beating down upon the body of his adversary and mastering it”).

<sup>66</sup> GEORGE P. FLETCHER & STEVE SHEPPARD, *AMERICAN LAW IN A GLOBAL CONTEXT: THE BASICS* 182 (Oxford Univ. Press 2005).

<sup>67</sup> OGLETREE, *supra* note 2, at 57-58.

<sup>68</sup> ERIC FONER, *RECONSTRUCTION: AMERICA’S UNFINISHED REVOLUTION 1863-77* at 276-77 (HarperCollins 1988).

<sup>69</sup> OGLETREE, *supra* note 2, at 57; Foner, *supra* note 68, at 354-55.

<sup>70</sup> WILLIAM ARCHIBALD DUNNING, *RECONSTRUCTION, POLITICAL AND ECONOMIC: 1865-1867* at 260 (Harper & Row 1962).

<sup>71</sup> Timothy V. Kaufman-Osborn, *Capital Punishment as Legal Lynching? in FROM LYNCH MOBS TO THE KILLING STATE: RACE AND THE DEATH PENALTY IN AMERICA* 23-24 (Charles J. Ogletree, Jr. & Austin Sarat eds., New York Univ. Press 2006) (“the liberal social contract of the United States has always been underwritten by... ‘the racial contract’, and hence racist practices... are not aber-

rations from this nation's true principles but, rather, manifestations of its abiding commitment to sustain the conditions of racial exploitation...The central purpose of the racial contract is to secure and ratify limitations on the freedoms, rights, and privileges of those whose exploitation is a condition of the freedoms, rights and privileges of the superordinate group. Racial domination, on this account, cannot be understood as an unfortunate departure from a norm of universal equalitarianism, for, from its very inception, the United States has been 'a system for which racially determined structural advantage and handicap are foundational'").

<sup>72</sup> Jed S. Rakoff, *The Federal Mail Fraud Statute (Part I)*, 18 DUQ. L. REV. 771, 780 (1980).

<sup>73</sup> VIRGIL, *THE AENEID* 33-34 (Robert Fitzgerald, trans., 1983) (cir. 19 BC).

<sup>74</sup> *Id.* at 42.

<sup>75</sup> *Id.*

<sup>76</sup> *Id.* at 43.

<sup>77</sup> See generally, MICHAEL PERMAN, *THE ROAD TO REDEMPTION: SOUTHERN POLITICS* (Univ. of North Carolina Press 1989).

<sup>78</sup> See generally, FONER, *supra* note 68.

<sup>79</sup> PERMAN, *supra* note 77.

<sup>80</sup> *Id.*

<sup>81</sup> See FONER, *supra* note 68, at 577 ("The persistent idea of a vast reservoir of Southern Whigs eager to join the Republican party contained more than a little wishful thinking. But with Reconstruction having demonstrably failed to produce a Republican South, few Northerners could envision an alternative").

<sup>82</sup> FONER, *supra* note 68, at 578-80.

<sup>83</sup> *Id.* at 604.

<sup>84</sup> HOBBS, *supra* note 16, at 88. The above quotation is a modernized version of the original passage, "Warre, consisteth not in Battell onely, or the act of fighting; but in a tract of time, wherein the Will to contend by Battell is sufficiently known."

<sup>85</sup> See FONER, *supra* note 68, at 586 ("The federal courts, for example, retained the greatly expanded jurisdiction born of Reconstruction).

<sup>86</sup> See generally, *id.* at 587-601.

<sup>87</sup> *Plessy v. Ferguson*, 163 U.S. 537, 546 (1896) (discussing how the case held that an act of Congress giving all persons within the US have "full and equal enjoyment" of public facilities was unconstitutional because the Fourteenth Amendment did not apply to states).

<sup>88</sup> See *id.* at 546-47 (explaining that according to the Civil Rights Cases, the states have the exclusive right and the power to regulate the social relations between the races. The federal government may intervene only if the state abuses its authority by entrenching upon principles of due process or violating equal protection of the laws).

<sup>89</sup> *Id.* at 552.

<sup>90</sup> FLETCHER, *supra* note 34 at 197.

<sup>91</sup> See Kaufman-Osborn, *supra* note 71, at 26 (describing how some of these laws were more brazen in their contempt for the constitution than others, stating that "[b]arely less transparent than slavery, for example, were those post-Reconstruction laws, which, dispensing with any façade of statutory neutrality, expressly excluded blacks from participation in certain practices definitive of citizenship (e.g., jury duty)." In other contexts, "[s]omewhat less transparent were the various mechanisms devised in the post-Reconstruction South to disenfranchise blacks without technically violating the Fourteenth and Fifteenth Amendments, including poll taxes, grandfather clauses, and literacy tests").

<sup>92</sup> *Id.*

<sup>93</sup> GEORGE P. FLETCHER & STEVE SHEPPARD, *AMERICAN LAW IN A GLOBAL CONTEXT: THE BASICS* 182 (Oxford Univ. Press 2005).

<sup>94</sup> See *ENCYCLOPEDIA ENCARTA* (2008), [www.encyclopedia-msn.com](http://www.encyclopedia-msn.com) (noting that lynching, as a form of punishment for presumed criminal offenses, performed by self-appointed commissions, mobs, or vigilantes without due process of law took place in the United States even before the American Civil War and after all over the nation from southern states to western frontier settlements. The term "lynching" is believed to have originated during the American Revolution when Charles Lynch, a Virginia justice of the peace, ordered extralegal punishment for Tory acts).

<sup>95</sup> See Kaufman-Osborn, *supra* note 71, at 27.

<sup>96</sup> *Id.* at 27; See also OGLETREE, *supra* note 2, at 58 ("The treatment of African-Americans became more vicious as the twentieth century dawned," with lynchings taking on a "distinctively black/white racial character").

<sup>97</sup> Kaufman-Osborn, *supra* note 71, at 28.

<sup>98</sup> OGLETREE, *supra* note 2, at 58.

<sup>99</sup> See Kaufman-Osborn, *supra* note 71, at 28 ("By effectively equating the meaning of blackness with the predatory, the savage, the animalistic, the hypersexualized, lynchings demonstrated the patent ineligibility of those so marked to

inhabit the category of citizen, while it simultaneously recertified the identity of those defined not by their degraded corporeality but by their white personhood and so their exclusive occupation of that same category").

<sup>100</sup> See RIVKIND, *supra* note 47, at 25.

<sup>101</sup> *Id.* at 31.

<sup>102</sup> See *id.* at 32 ("it was not uncommon for lynching parties to mimic certain of the formal procedures that... are said to distinguish lawful trials from extralegal lynchings." In fact, "a very large number of spectacle lynchings were conducted either with the active participation of police officers (along with other community elites), or with their obvious connivance". These observations underscored "the permeability of the boundary between, on the one hand, the bands of white citizens who typically instigated such lynchings and duly authorized agents of law enforcement, on the other").

<sup>103</sup> OGLETREE, *supra* note 2, at 60-61.

<sup>104</sup> *Id.*

<sup>105</sup> Kaufman-Osborn, *supra* note 71, at 35.

<sup>106</sup> *Id.* at 33.

<sup>107</sup> ROBINSON, *supra* note 2, at 5.

<sup>108</sup> *Id.*

<sup>109</sup> See *id.* at 5-6 ("Between 1976 and 2005, there were 1,004 executions. Of these, 355 occurred in Texas (35%), 94 in Virginia (9%), 79 in Oklahoma (8%), 66 in Missouri (7%), and 60 in Florida (6%). No other state has executed 50 people since 1976. Of the states that have executed at least 20 people since 1976, all but 2 are in the South (North Carolina and Georgia with 39, South Carolina with 35, Alabama with 34, Louisiana with 27, Arkansas with 27, Arizona with 22, and Ohio with 20). Thus, since 1976, 82% of executions have occurred in the South, followed by 12% in the Midwest and 6% in the West. Only 4 executions have occurred in the Northeast since 1976" Moreover, "[i]n terms of execution rates per capita, the top 15 states most likely to carry out death sentences through the end of 2005 were Oklahoma, Delaware, Texas, Virginia, Missouri, Arkansas, South Carolina, Alabama, Louisiana, Nevada, Georgia, North Carolina, Arizona, Florida and Indiana. Again the South leads the way, as 11 of the top 15 states are in the South").

<sup>110</sup> ROBINSON, *supra* note 2, at 5.

<sup>111</sup> See generally, Ruth E. Friedman, *Statistics and Death: The Conspicuous Role of Race Bias in the Administration of Death Penalty*, 11 LA RAZA L. J. 75 (1999) (analyzing the role of race in contributing in the racial disparity of capital punishment in the United States).

<sup>112</sup> See RIVKIND, *supra* note 47, at 25 (challenging the assertion the conventional assertion that the decline in lynching was a victory for law enforcement, instead asserting that the practice was merely driven underground, with public spectacle lynchings being replaced by covert murders).

<sup>113</sup> Kaufman-Osborn, *supra* note 71, at 36-37; RIVKIND, *supra* note 47, at 25.

<sup>114</sup> See OGLETREE, *supra* note 2, at 55, 60 ("In the modern era, many have characterized the use of capital punishment in America as 'legal lynching,' due to its historical inseparability from the issue of race").

<sup>115</sup> RIVKIND, *supra* note 47, at 25 ("In the South, perfunctory trials often followed by hasty executions replaced lynching and institutionalized racial violence against African-Americans").

<sup>116</sup> See MELUSKY, *supra* note 31, at 211.

<sup>117</sup> TIME ALMANAC 2005, WITH INFORMATION PLEASE 377 (Borgna Brunner ed., Pearson Education, Inc. 2004).

<sup>118</sup> Melusky, *supra* note 31, at 211.

<sup>119</sup> FRANKLIN E. ZIMRING & GORDON HAWKINS, *CAPITAL PUNISHMENT AND THE AMERICAN AGENDA* 37 (Cambridge Univ. Press 1989).

<sup>120</sup> U.S. Census Bureau, <http://www.census.gov/population/www/documentation/twps0056/tab04.pdf> (last visited Nov. 4, 2008).

<sup>121</sup> FITZPATRICK, *supra* note 36, at 121.

<sup>122</sup> See Kaufman-Osborn, *supra* note 71, at 23 ("[C]apital punishment, as now conducted in the United States, occludes what lynching accomplished all too well. Whereas lynchings visibly marked the bodies of its victims as black and so reconsolidated the color line that was indispensable to the reproduction of racial subordination, key elements of the contemporary practice of capital punishment veil that line and so render its contribution to racial subordination more difficult to apprehend and so to contest").

<sup>123</sup> *Id.* at 48-49.

<sup>124</sup> FLETCHER, *supra* note 34, at 26.

<sup>125</sup> See Kaufman-Osborn, *supra* note 71, at 26 ("Today, re-creation of the racial contract in the United States requires ongoing negotiation of the tension between the social contract's formally color-blind principles and the color-coded practices, which, although necessary to white superordination, must now do their work in a state of relative (but not complete) invisibility").

<sup>126</sup> See *id.* ("the capacity of such invisibility to veil the workings of the racial

## ENDNOTES CONTINUED

contract is enhanced... by the ‘epistemology of ignorance’ that is often evinced by those who benefit from the racial contract but whose self-conception renders them unable to recognize, let alone to acknowledge, that they do so,” quoting CHARLES MILLS, *BLACKNESS VISIBLE* (Ithaca: Cornell Univ. Press, 1998)).

<sup>127</sup> See *id.* at 47 (“By eliminating the race-specific punishments that persisted in the South well after Reconstruction, the liberal state removes the dissonance generated by the persistence of such punishments, on the one hand, and the social contract’s commitment to formal equality under law, on the other”).

<sup>128</sup> *Id.* at 38.

<sup>129</sup> See *id.* at 24-25 (“Within a liberal political order formally committed to an ideal of equal citizenship, ratification of such subordination has been accomplished... through generation and ongoing activation of a distinction between ‘persons’ and ‘subpersons’”. In the United States, perhaps the most obdurate materialization of this distinction has been that between white and black, where racial identity is understood ‘as a *politically constructed categorization*,’ ‘the marker of locations or privilege and disadvantage in a set of power relationships’”).

<sup>130</sup> See Bright, *supra* note 2, at 219 (“Until recently, African-Americans facing the death penalty in Georgia usually appeared before a white judge sitting in front of the Confederate battle flag.” The underlying bellicose message cannot

be overlooked, as “Georgia adopted its state flag in 1956 to symbolize its defiance of the Supreme Court’s decision in *Brown v. Board of Education*. One federal district judge in Georgia observed that the predominant part of the 1956 flag is the Confederate battle flag, which is historically associated with the Ku Klux Klan”).

<sup>131</sup> Austin Sarat, *Capital Punishment as a Legal, Political, and Cultural Fact: An Introduction*, in *THE KILLING STATE: CAPITAL PUNISHMENT IN LAW, POLITICS, AND CULTURE* 4 (Austin Sarat, ed., Oxford Univ. Press 1999).

<sup>132</sup> Stuart Banner, *Traces of Slavery: Race and the Death Penalty in Historical Perspective*, in *FROM LYNCH MOBS TO THE KILLING STATE: RACE AND THE DEATH PENALTY IN AMERICA* 100-01 (Charles J. Ogletree, Jr. & Austin Sarat eds., New York Univ. Press 2006).

<sup>133</sup> *Gregg v. Georgia*, 428 U.S. 153, 230 (1976) (Brennan, J., dissenting).

<sup>134</sup> SARAT, *supra* note 35, at 4-5.

<sup>135</sup> See *id.* at 5 (“It may be that our attachment to state killing is paradoxically a result of our deep attachment to popular sovereignty. Where sovereignty is most fragile, as it always is where its locus is in “the People”, dramatic symbols of its presence, like capital punishment, may be most important”).



(from left to right) Tanisha James (past Editor-in-Chief for *The Modern American*), Lydia Edwards (past Editor-in-Chief for *The Modern American*), the Honorable Judge Joyce Hens Green (United States District Court for the District of Columbia), Lee Ann O'Neill (past Editor-in-Chief), Mara Giorgio (outgoing Editor-in-Chief for *The Modern American*).

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# COMBATING GENDER INEQUITIES IN LAW SCHOOL: TIME FOR A NEW FEMINIST RHETORIC THAT ENCOURAGES PRACTICAL CHANGE

By  
Caitlin Howell\*

## INTRODUCTION

Despite the fact that law schools are admitting men and women in relatively equal numbers, they are failing to adequately prepare women for success.<sup>1</sup> Not only do women report feeling marginalized in law school classrooms, but also they statistically under-perform men.<sup>2</sup> Additionally, men continue to dominate the upper levels of the legal profession.<sup>3</sup> Recently though, it has also become clear that men experience law school negatively.<sup>4</sup> Just like women, men are not being taught all the skills they need to be effective attorneys.<sup>5</sup>

Over the course of contemporary women's legal history, different feminist scholars have attempted to identify solutions to gender inequities in law school.<sup>6</sup> Many feminist legal scholars have hypothesized that the adversarial nature of law school is inherently discriminatory against women because it rewards masculine behavior.<sup>7</sup> They argue that the Socratic method, the hierarchical nature of law school journals, the fierce competition for clerkships and externships, and mock/moot court competitions all reward such behavior. These feminist scholars, therefore, propose a reinvention of law school pedagogy that would reward feminine behavior. They also propose to insert feminist perspectives into the curriculum.<sup>8</sup> This essay argues that while this approach could benefit women and men, it may perpetuate gender inequity by stereotyping a highly diverse group of women.<sup>9</sup>

In Part II, I will provide a background on the concept of gender inequity and negative experiences in law school. Then, I will also sketch the different feminist approaches to address gender inequity in law school.<sup>10</sup> In Part III, I will identify the gaps in such feminist scholarship. I will also argue that feminists should shift their critique to how law schools are failing to provide both women and men with all the skills they need to be effective attorneys.<sup>11</sup> Finally, in Part IV, I will suggest that law schools would lessen gender inequity if they commit to producing lawyers who are capable of meeting diverse professional demands.<sup>12</sup>

## BACKGROUND

### *GENDER INEQUITY AND NEGATIVE LAW SCHOOL EXPERIENCES*

The scholarship devoted to examining the marginalization of law students on the basis of gender has risen with the increase of women entering law school.<sup>13</sup> By conducting empirical studies through the lens of feminist theory, scholars have identified significant gender inequities in law school that negatively impact students' experiences.<sup>14</sup> Generally, in law school women under-perform men in terms of grades.<sup>15</sup> They are also unrepresented on grade-based law journals.<sup>16</sup> Specifically, studies show that women participate less than men do in the class-

room.<sup>17</sup> Women are discouraged from participating partly because the majority of first year professors are males.<sup>18</sup> Women also report higher levels of anxiety, stress, and depression in law school than men do.<sup>19</sup> Studies indicate that, after their first year of law school, women are less confident in their ability to become successful lawyers.<sup>20</sup> Some women attribute their lower rates of classroom participation, feelings of anxiety, and lack of confidence in part to the Socratic method and competitive classroom environment.<sup>21</sup> They also attribute these feelings to the limited professor feedback in classes culminating in a "one-shot," end of the year exam.<sup>22</sup>

### *FEMINIST APPROACHES TO ADDRESSING GENDER INEQUITY*

Feminist scholars have attempted to devise a variety of solutions in response to finding that women under-perform men and experience law school negatively.

### *INSERTING WOMEN AND WOMEN'S ISSUES INTO LAW SCHOOL*

Some scholars suggest that a basis for reforming legal education should be inserting gender and feminist perspectives into first year classes, such as torts and contract law.<sup>23</sup> This approach would insert into the curriculum the legal accomplishments and contributions of women.<sup>24</sup> This approach would also recast classes on feminism and the law as essential.<sup>25</sup> These scholars argue that integrating women's issues into the law could help female students feel less alienated from law school.<sup>26</sup> Not only would women participate more in the classroom, but male students would also learn about pervasive gender attitudes in the legal field.<sup>27</sup>

To achieve equality for women in law school, this approach would also increase both, the sheer number of female law professors as well as the number of female professors in positions of seniority.<sup>28</sup> In order to achieve equality for women in law school, scholars argue that female faculty members are essential as role models because they bring greater diversity in pedagogy and perspectives to the classroom.<sup>29</sup> Scholars also assert that having female role models would increase the comfort level of women in the classroom and female students' self-esteem would rise by seeing successful women in the profession.<sup>30</sup> This higher level of confidence could translate into higher grades and improved overall performance rates for women in law school.<sup>31</sup>

### *ADOPTING "WOMEN-FRIENDLY" TEACHING METHODS*

Some scholars suggest going beyond introducing more women and women's issues into law school. They advocate restructuring the current adversarial law school model by using more feminized teaching methods<sup>32</sup> to make it friendlier to



women.<sup>33</sup> Specifically, these scholars recommend making law school a more “nurturing environment”. They suggest eliminating or tempering the Socratic method, encouraging small-group discussions and smaller class sizes. They also suggest increasing professor feedback. Professors would be encouraged to establish a good rapport with students.<sup>34</sup> As a result, women would be less anxious and be more likely to participate in a “comfortable classroom” environment where professors provide positive reinforcement and create a sense of community.<sup>35</sup>

Scholars that advocate making law school friendlier to women also suggest importing aspects of feminist pedagogy into the classroom.<sup>36</sup> This would include encouraging more collaborative and cooperative styles of teaching and learning to decrease adversariness.<sup>37</sup> Using more feminist teaching methods could empower women to assert themselves in the classroom and later, in the professional world.<sup>38</sup>

#### *“HUMANIZING” LAW SCHOOL*

Instead of changing law school to accommodate women’s different learning style, some scholars argue that humanizing law school eliminates gender inequity without stereotyping women.<sup>39</sup> Humanizing law school means fostering an ethic of care in the classroom. This would include providing positive reinforcement to students and demonstrating respect for students’ opinions and ideas.<sup>40</sup> For instance, professors would encourage cooperation in class by asking students to assist their colleagues or “co-counsel” when a student gets nervous and then, return to the student after she or he has regained composure.<sup>41</sup>

Demystifying the learning process is another hallmark of the humanizing approach.<sup>42</sup> Instead of eliminating the Socratic method, professors should explain the purpose for using it.<sup>43</sup> Explaining to students that the Socratic method is more of a dialogue rather than their only opportunity to demonstrate that they can “think like a lawyer,” could relieve anxiety in the classroom.<sup>44</sup> When professors explain to students that the Socratic method is meant to generate discussion rather than a single “correct” answer, law schools would reward women’s ability to think with a multiple consciousness, or a greater variety of perspectives.<sup>45</sup>

#### *SETTING ASIDE THE ASSUMPTION OF GENDER DIFFERENCE*

Arguing from a very different viewpoint, some scholars advocate setting aside gender differences as something occurring prior to women’s marginalization in law school.<sup>46</sup> Instead of looking at gender as the problem, feminists should examine the concept of gender as the consequence of the power structure of law school.<sup>47</sup> In other words, “gender” is nothing more than a construct perpetuated by male-dominated law schools to keep women from advancing with the same rates of success.<sup>48</sup>

Addressing gender inequity in law school then becomes a question of examining operations of power rather than generalizing about women’s perspectives.<sup>49</sup> Law schools should change their focus from attempting to make law school a more “feminine” place to increasing the political representation of feminist ideas.<sup>50</sup> This approach contends that by imbuing the content of legal education with feminist politics, not femininity, women’s law school experiences would improve.<sup>51</sup>

## **ANALYSIS**

### **GAPS AND PROBLEMS IN CURRENT FEMINIST SCHOLARSHIP**

#### *“STIRRING IN” WOMEN AND FEMINIST PERSPECTIVES*

Feminist perspectives should be included in the law school curriculum. However, introducing separate “women’s issues” in basic classes may exacerbate the notion that these are “outsider” interests or “asides to the more important objective business that is the true subject of the class.”<sup>52</sup> Moreover, addressing women’s issues in separate courses may perpetuate the notion that women’s interests are personal having limited relevance to the law generally.<sup>53</sup> Merely introducing feminist perspectives as asides also fails to address the current law school methods and institutions that perpetuate gender inequity.<sup>54</sup>

Similarly, merely increasing the number of women on law school faculty will not automatically alleviate gender inequity in the classroom.<sup>55</sup> Female professors who heavily utilize the Socratic method also intimidate women students.<sup>56</sup> In fact, seeing women “do law like men” can only heighten feelings of inadequacy for female law students.<sup>57</sup> Therefore, inserting more women onto law school faculty without also restructuring the pedagogy may only perpetuate gender inequity.<sup>58</sup>

#### *SEX-STEREOTYPING GENDER NORMS*

Attempting to humanize law school or make it more women-friendly based on stereotypically feminine characteristics, necessitates defining what is feminine because it does not escape essentializing both men and women.<sup>59</sup> Restructuring law school based on sex-stereotypes of masculinity and femininity excludes from the discourse women that are “unfeminine” and men that are more “feminine.”<sup>60</sup> The humanizing approach purports to circumvent sex-stereotyping. However, it still seeks to accommodate stereotypical feminine traits such as thinking with multiple consciousnesses.<sup>61</sup> The Socratic method does not disserve all women, just as it does not benefit all men.<sup>62</sup> Envisioning femininities and masculinities as homogeneous norms only serves to sex-stereotype a highly diverse student body. Sex-stereotyping marginalizes differences with regard to race, class, and sexual orientation.<sup>63</sup>

#### *LOWERING EXPECTATIONS FOR WOMEN*

Feminist rhetoric advocating that law schools should become more women-friendly exacerbates gender inequity and lowers the expectations for women in law school. This rhetoric encourages the notion that women cannot succeed in law school unless it “softens up.”<sup>64</sup> Advocating the need to make law school more “nurturing” or “women friendly” as essential for women’s success perpetuates female law students’ feelings of inadequacy in the legal profession.<sup>65</sup> This rhetoric does not address the law schools’ failure to meet demands on lawyers. Instead, it can wrongfully lead to the conclusion that restructuring law school to accommodate women comes at the expense of professional training for all students.<sup>66</sup> Instead of addressing the way in which gender inequity in law school is inextricably linked to the failure of law schools to adequately depict the range of demands on lawyers, the women friendly approach lowers the expectations for women in law school.<sup>67</sup>

Feminist legal scholarship largely ignores the negative impact that the adversarial law school model also has on men.<sup>68</sup> Studies on gender inequity in law school show that men experience law school negatively as well.<sup>69</sup> Although 41% of females reported a loss of confidence in law school, 16.5% of men did too.<sup>70</sup> While 16.5% is a significant percentage, the number of men that experience a loss in self-esteem may be even higher since men are less likely to report or seek help for feelings of distress.<sup>71</sup> Another study indicated that while one in two female law students reported feeling less intelligent in law school, so did almost one in three male students.<sup>72</sup> The law school model, therefore, is harming men as well as women.<sup>73</sup> This is particularly true for men who represent a minority or less-traditional male perspectives. By not stressing the fact that legal education is failing everyone, feminists risk giving the impression that reform should occur purely to accommodate women.<sup>74</sup>

### SHIFT IN FOCUS

Feminist legal scholars should re-focus their critique of law school to address the practical failings of the adversarial model, which negatively impacts women and men as students and professionals. By couching recommendations for reform of law schools purely in terms of gender, feminists are not effectively identifying the gross failings of legal education. Addressing the failure of law schools to adequately prepare women and men to meet the range of demands on lawyers could push law schools to make real changes without exacerbating gender inequity.<sup>75</sup>

#### THE CURRENT LAW SCHOOL MODEL DOES NOT ADEQUATELY DEPICT THE RANGE OF DEMANDS ON LAWYERS

Law school currently overemphasizes certain skills and underemphasizes others, failing to prepare women and men for a diverse professional world.<sup>76</sup> Currently emphasized skills include adversarial competition, aggressiveness, abstract doctrinal analysis, quickness, and performance.<sup>77</sup> Underemphasized skills include collaboration, counseling, mediation, lawyer-client relationships, problem solving, and facilitating transactions.<sup>78</sup> The former model, primarily based on litigation and doctrinal analysis, only applies to a small fraction of real-world practice.<sup>79</sup> Many lawyers do not litigate, go to court, or even work in large firms.<sup>80</sup> Additionally, "for those employed as in-house counsel or are engaged in transactional lawyering, negotiation contrasts starkly to the classic notion propagated by the Socratic method of advocating one side before an appellate court."<sup>81</sup>

Instead, the legal profession increasingly values collaboration, group problem-solving, role flexibility, and proffering question as well as criticisms.<sup>82</sup> The American Bar Association has identified problem-solving, comprised of generating alternative strategies and keeping the planning process open to new ideas, to be a fundamental lawyering skill.<sup>83</sup> Therefore, learning collaborative skills is essential for students as lawyers and firms expand the kinds of services they provide to meet their clients' diverse needs.<sup>84</sup>

Law schools committed to producing lawyers that are more capable of meeting diverse professional demands should recast academic priorities. Recasting these priorities would simultaneously lessen gender inequity.<sup>85</sup> Combining more collaborative teaching styles with current law school pedagogy would alter both the academic structure and educational substance of law school in a way that would benefit women and men.<sup>86</sup>

In terms of academic structure, law schools should rely far less on large lectures or Socratic questioning. Law schools should, instead, add more emphasis to clinical programs and experiential learning.<sup>87</sup> With more emphasis on hands-on lawyering skills and less on abstract and authoritarian interchange between students and professors, law schools should give students more of an inside look at what it takes to be a professional instead of "hiding the ball."<sup>88</sup>

Law schools should also increase small group discussion sections in basic courses. Small group discussion would help students develop collaborative skills necessary for real world practice. By developing collaborative skills, small group discussions would simultaneously break down competitiveness in the classroom.<sup>89</sup> In addition, unlike an end of the year, one-shot exam, more exercises and class simulations would give students increased feedback on a regular basis. Using diverse teaching methods such as small group discussions, therefore, would increase possibilities for students with different learning styles and more accurately reflect the demands on lawyers in practice.<sup>90</sup>

In terms of educational substance, more focus should be on the contextual application of the law rather than on abstract doctrinal analysis.<sup>91</sup> Topics such as race, gender, class, ethnicity, and sexual orientation should become more central to the discussion of legal institutions and lawyer-client relationships.<sup>92</sup> Instead of the occasional insertion of gender and race into the curriculum,<sup>93</sup> these issues should become an integral part of the core curriculum.<sup>94</sup> Analysis that uses dimensions such as gender to socially contextualize cases would move beyond the "add women and stir" approach.<sup>95</sup> Moreover, emphasis on interpersonal skills and diversity would more adequately equip students to deal with clients and colleagues. Students would move away from the false notion that lawyering is always about adversariness.<sup>96</sup> Focusing on the contextual application of the law, therefore, will address the current professional failings of lawyers to understand and better represent a diverse client body.<sup>97</sup>

### CONCLUSION

Since the 1980's, more women have been admitted into law schools. However, ever since then, feminist legal scholars have identified more subtle forms of gender inequity in law school.<sup>98</sup> Many feminists argue that the source of inequity is the inherently masculine law school model. This model, they argue, rewards male behavior and penalizes women in terms of performance and experience.<sup>99</sup> Similarly, scholars have proposed solutions to the disparate law school experiences in terms of gender without problematizing femininities or masculinities.<sup>100</sup> However, these solutions rest on stereotypical definitions of what is "male" and "female." Stereotypical definitions only risk



perpetuating gender inequity in law school.<sup>101</sup> By using rhetoric and strategies that suggest law schools should accommodate women, feminists bolster the notion that women do not belong in law school unless it “softens up.”<sup>102</sup>

The studies that feminist scholars have conducted show that men, women, and minorities are all experiencing law school negatively. Law schools are failing to teach everyone the skills they need to be effective lawyers.<sup>103</sup> Like the metaphor commonly used to describe women in law school, the canary is just the first indication that the mine is toxic.<sup>104</sup> Through their studies, feminist scholars have identified the institutional failings of law school. It is time for a new feminist rhetoric that encourages

practical changes without sex-stereotyping men and women.<sup>105</sup> Feminist rhetoric should encourage law schools to equip students to meet diverse professional demands. To meet these demands, law schools should change both the academic structure and substance of legal education. These changes would simultaneously lessen gender inequity.<sup>106</sup> Whether certain skills or behaviors are “male” or “female” or whether “masculine” skills are currently overemphasized in law school while “feminine” skills are underemphasized is irrelevant. One thing is clear: law schools are failing a diverse range of students and need to change.

## ENDNOTES

\* Juris Doctorate Candidate American University, Washington College of Law 2009; B.A. Trinity University. The author wishes to thank Mary Clark, Corie Caldarola, and Adam Sabrin for all of their help and support.

<sup>1</sup> See Sari Bashni & Maryana Iskander, *Why Legal Education is Failing Women*, 18 YALE L.J. & FEMINISM 389, 391 (2006) (criticizing law schools for cultivating patterns of behavior more likely to be found among men that do not necessarily reflect the skills students need to be good lawyers).

<sup>2</sup> See Lani Guinier et al., *Becoming Gentlewomen: Women's Experience at One Ivy League Law School*, 143 U. PA. L. REV. 1, 3 (1994) (determining that women have lower grades in their first year of law school because they feel alienated from the law school environment); WORKING GROUP ON STUDENT EXPERIENCES, HARVARD LAW SCHOOL Study on Women's Experiences at Harvard Law School, 26 (Feb. 2004), available at [www.law.harvard.edu/students/experiences](http://www.law.harvard.edu/students/experiences) (noting that women under-perform slightly). But see Marsha Garrison, *Succeeding in Law School: A Comparison of Women's Experiences at Brooklyn Law School and the University of Pennsylvania*, 3 MICH. J. GENDER & L. 515, 520 (1996) (finding no discrepancy in grades earned by male and female law students at Brooklyn Law School).

<sup>3</sup> See Bashni, *supra* note 1, at 394 (noting that women represent only 19.8% of federal judges and 17.3% of law firm partners).

<sup>4</sup> See Joan M. Krauskopf, *Touching the Elephant: Perceptions of Gender Issues in Nine Law Schools*, 44 J. LEGAL EDUC. 311, 328 (1994) (finding that although 41% of females indicated a loss of confidence in law school 16.5% of males did too); see also Banu Ramachandran, *Re-Reading Difference: Feminist Critiques of the Law School Classroom and the Problem with Speaking From Experience*, 98 COLUM. L. REV. 1757, 1762 (1998) (noting that men may suffer distress at equal or even greater rates but may be less likely to report it); Garrison, *supra* note 2 (citing numerous sources supporting the proposition that the first year of law school is a highly stressful, isolating, and alienating experience for men and women).

<sup>5</sup> See Lani Guinier, *Lessons and Challenges of Becoming Gentlemen*, 24 N.Y.U. REV. L. & SOC. CHANGE 1, 10 (noting that the skills involved in lawyering are complex and are not captured in the current law school model that presents lawyering as a contest).

<sup>6</sup> See generally, Banu Ramachandran, *supra* note 4 (discussing the wide variety of feminist perspectives on gender inequity in law school).

<sup>7</sup> See, e.g., Guinier, *supra* note 2, at 51 (noting that hostile questioning may cause many women to remain silent in the classroom); see generally Susan P. Sturm, *From Gladiators to Problem Solvers: Connecting Conversations About Women, the Academy, and the Legal Profession*, 4 DUKE J. GENDER & POL'Y 119, 121 (1997) (describing that the adversarial or “gladiator” model visibly excludes women from participating in the classroom); Morrison Torrey, Jennifer Ries & Elaine Spiliopoulos, *What Every First-Year Law Student Should Know*, 7 COLUM. J. GENDER & L. 267 (1998) (citing many sources implicating that women's perception of law school as a hostile environment decreased their participation).

<sup>8</sup> See, e.g., Guinier, *supra* note 5, at 1 (arguing that the on-size-fits-all law school model needs to be changed to remedy the pervasively negative law school experiences of women).

<sup>9</sup> See Ramachandran, *supra* note 4, at 1794 (suggesting that understanding gender as the consequence, not the cause, of women's marginalization in law school can prevent sex-stereotyping).

<sup>10</sup> See *infra* Part II (exploring women's negative experience in law school and feminist approaches to ameliorate gender inequity in legal education).

<sup>11</sup> See *infra* Part III (discussing the gaps in feminist theory with regard to gender inequity and suggesting that feminists shift their focus to the way law school is

failing to provide women and men with professional skills).

<sup>12</sup> See *infra* Part IV (concluding that law school should change the structure and substance of legal education to more adequately train lawyers to meet diverse professional demands).

<sup>13</sup> See Ramachandran, *supra* note 4, at 1757 (noting the explosion of feminist studies in response to the recent surge in the number of women attending law school).

<sup>14</sup> See *id.* at 1760 (describing the variety of difficulties women face in law school).

<sup>15</sup> See Guinier, *supra* note 2, at 28 (finding that men were three times more likely to be in the top 10% of the law school class after their first year); see also Suzanne Homer & Lois Schwartz, *Admitted but Not Accepted: Outsiders Take an Inside Look at Law School*, 5 BERKELEY WOMEN'S L.J. 1, 30, 39 (1989) (finding that one in six men received grades in the top ten percent of their first-year contracts class, while only one in sixteen women did so); see also Working Group on Student Experiences, *supra* note 2, at 26 (finding that 31% of men's grades were an A- or better compared with 25% of women).

<sup>16</sup> See *id.* at 20.

<sup>17</sup> See Guinier, *supra* note 2, at 130 n.86 (finding that men reported speaking twice as often as women); see also Homer, *supra* note 12, at 29 (finding that the majority of women indicated they never volunteered or asked questions in class compared with two-thirds of white males who stated they did so frequently); see also WORKING GROUP ON STUDENT EXPERIENCES, *supra* note 2, at 18 (finding that men are 142% more likely than women to speak voluntarily three times or more in class).

<sup>18</sup> See Homer, *supra* note 13, at 35 (finding that women reported they would be more likely to speak in class if it was taught by a woman and prefer a female professor's approach).

<sup>19</sup> See Guinier, *supra* note 2, at 44 (finding that women were more likely than men to report disorders as a result of law school); see also Janet Taber, *Gender, Legal Education, and the Legal Profession: An Empirical Study of Stanford Law Students and Graduates*, 40 STAN. L. REV. 1209, 1251 (1988) (finding that women students are more likely to cry, have nightmares, and suffer from insomnia than men); see also Working Group on Student Experiences, *supra* note 2, at 23 (finding that women students have higher rates of anxiety, depression, and sleeping difficulties than male respondents).

<sup>20</sup> See Krauskopf, *supra* note 4, at 328 (finding that women were more likely than men to agree with the statement “Before law school I thought of myself as intelligent and articulate, but often I don't feel that way about myself now”); see also Homer, *supra* note 12, at 33 (finding that 51% of women students “agreed with the statement that although they felt intelligent and articulate prior to law school, they did not feel that way at Boalt”).

<sup>21</sup> See Guinier, *supra* note 2, at 278-79 (finding that many female students felt disabled from participation in the classroom by the Socratic method); see also Catherine Weiss & Louise Melling, *The Legal Education of Twenty Women*, 40 STAN. L. REV. 1299, 1327-28, 1333, 1337-39 (1988) (finding that first year women at Yale Law expressed a fear of speaking in class because of the aggressive nature of the Socratic method).

<sup>22</sup> See Sarah E. Theimann, *Beyond Guinier: A Critique of Legal Pedagogy*, 24 N.Y.U. REV. L. & SOC. CHANGE 17, 22 (1998); see also Torrey & Reis, *supra* note 7, at 289 (explaining how women are more likely to internalize lack of positive feedback in a way that affects their performance on exams).

<sup>23</sup> See Lucinda M. Finley, *A Break In the Silence: Including Women's Issues in A Torts Course*, 1 YALE J.L. & FEMINISM 41, 42 (1989).

<sup>24</sup> Nancy E. Dowd, Kenneth B. Nunn, & Jane E. Pendergast, *Diversity Matters: Race, Gender, and Ethnicity in Legal Education*, 15 U. FLA. J.L. & PUB. POL'Y

11, 41 (2003).

<sup>25</sup> See Melissa Harrison, *A Time of "Passionate Learning: Using Feminism, Law, and Literature to Create A Learning Community*, 60 TENN. L. REV. 393, 425 (1993).

<sup>26</sup> See Finley, *supra* note 25, at 42 (stating that acknowledgment of gender issues in torts can help women feel less like outsiders to the enterprise of the law).

<sup>27</sup> See *id.* at 43.

<sup>28</sup> See Dowd, *supra* at note 26, at 44.

<sup>29</sup> See *id.*

<sup>30</sup> See Heather A. Carlson, *Faculty Mentoring As A Way to End the Alienation of Women in Legal Academia*, 18 B.C. THIRD WORLD L.J. 317, 333 (1998); see also Judith D. Fischer, *Portia Unbound: The Effects of A Supportive Law School Environment On Women and Minority Students*, 7 UCLA WOMEN'S L.J. 81, 111-12 (1996) (noting that female students complained that the lack of elite women contributed to lower levels of self-esteem).

<sup>31</sup> See *id.* at 334.

<sup>32</sup> See e.g. Theimann, *supra* note 22, at 20 (asserting that the law school curriculum should be more accessible to women); see also Fischer, *supra* note 30, at 82 (arguing that a "student-supportive" approach to legal education would decrease gender inequity).

<sup>33</sup> *Id.*

<sup>34</sup> See generally Theimann, *supra* note 20; see also Torrey & Reis, *supra* note 7, at 308 (advocating the elimination or drastic reform of the Socratic method to make women more comfortable in the classroom).

<sup>35</sup> See *id.* at 21, 23.

<sup>36</sup> See Linda Morton, *Creating A Classroom Component For Field Placement Programs: Enhancing Clinical Goals With Feminist Pedagogy*, 45 ME. L. REV. 19, 49 (1993).

<sup>37</sup> See Theimann, *supra* note 20, at 25.

<sup>38</sup> See Morton, *supra* note 37, at 420 (arguing that importing feminist pedagogy into law school classes would equip women to succeed in a male dominated profession).

<sup>39</sup> Jennifer L. Rosato, *The Socratic Method and Women Law Students: Humanize, Don't Feminize*, 7 S. CAL. REV. L. & WOMEN'S STUD. 37, 39 (1997) (arguing that adopting a "women-friendly" approach to reform law school sends the message that women cannot withstand the rigors of law school).

<sup>40</sup> See *id.* at 59-60.

<sup>41</sup> See *id.* at 60-61.

<sup>42</sup> See *id.* at 61.

<sup>43</sup> See *id.* at 61-62 (suggesting that debriefing students after the Socratic inquiry is over will lessen their anxiety).

<sup>44</sup> See *id.* at 62.

<sup>45</sup> See *id.* at 39 (stating that women are more likely to view the world from a variety of perspectives and therefore the Socratic method is an invaluable teaching method for female students).

<sup>46</sup> See Ramachandran, *supra* note 4, at 1794.

<sup>47</sup> See *id.*; see also Catherine A. MacKinnon, *FEMINISM UNMODIFIED: DISCOURSES ON LIFE AND LAW*, 32 (Harvard University Press 1987) (asserting that gender is a by-product of male dominance that is used to maintain male hierarchy).

<sup>48</sup> See Ramachandran, *supra* note 4, at 1794.

<sup>49</sup> See *id.* at 1786.

<sup>50</sup> See *id.* at 1792.

<sup>51</sup> See *id.* at 1793.

<sup>52</sup> See *id.* at 1782-83.

<sup>53</sup> See Mary Joe Frug, *Re-Reading Contracts: A Feminist Analysis of a Contracts Casebook*, 34 AM. U. L. REV. 1065, 1091-92 (1985).

<sup>54</sup> See Ramachandran *supra* note 6, at 1783 (arguing that dominant perspectives must be explicitly challenged in order to avoid marginalizing minority perspectives).

<sup>55</sup> See Paula Gaber, "Just Trying To Be Human in This Place." *The Legal Education of Twenty Women*, 10 YALE J.L. & FEMINISM 165, 202 (1998) (finding that women may be more intimidated by female law professors using adversarial teaching methods).

<sup>56</sup> See *id.* (finding that women had the "worst time" with a female law professor using the Socratic Method).

<sup>57</sup> See *id.* at 202-03 (reporting that a female law student seeing a woman use the Socratic Method made her feel like the whole law school embraced the adversarial model).

<sup>58</sup> See Guinier, *supra* note 5, at 16 (suggesting that the problem of gender inequity is located in the institution of legal education not in women).

<sup>59</sup> See Ramachandran, *supra* note 6, at 1790-91 (noting that reliance on masculine and feminine traits to reform law school marginalizes members of each sex

who do not possess majority viewpoints); see also United States v. Virginia, 518 U.S. 515, 546-56 (1996) (describing the injury to women in establishing a separate women's leadership program based on sex-stereotypes).

<sup>60</sup> See Ramachandran, *supra* note 4, at 1789 (discussing the way in which some feminists assume that all women are "feminine" upon entering law school).

<sup>61</sup> See Rosato, *supra* note 39, at 39 (asserting that a reformed Socratic Method would reward women's strength of thinking from a variety of different viewpoints).

<sup>62</sup> See Guinier, *supra* note 5, at 1 (noting that the negative experience of women in law school is not based on gender per se as evidenced by the fact that not all women perceive law school as a hostile environment).

<sup>63</sup> See Ramachandran, *supra* note 4, 1789. (arguing that defining what is feminine subsumes diversity among women).

<sup>64</sup> See Rosato, *supra* note 39, at 39 (suggesting that adopting women friendly teaching methods would send a dangerous message that women cannot withstand the rigors of the Socratic Method and therefore do not belong in law school).

<sup>65</sup> See *id.* at 39-40 (proposing that accommodating women by making law school more women friendly could prevent female students from realizing their potential as students and practitioners).

<sup>66</sup> See Ramachandran *supra* note 4, at 1791 (describing the way anti-feminist critics have used such language to stereotype women as unfit for law school).

<sup>67</sup> See Guinier, *supra* note 5, at 10 (describing the way in which the singularity of the current adversarial law school model fails to provide men or women with the skills they need to be effective practitioners).

<sup>68</sup> See Morrisson Torrey, *Yet Another Gender Study? A Critique of the Harvard Study and A Proposal For Change*, 13 WM. & MARY J. WOMEN & LAW 795, 797 (2007) (pointing out that men are also being deprived of a quality legal education).

<sup>69</sup> See Guinier *supra* note 2, at 1 (describing findings that indicate men experience law school negatively too).

<sup>70</sup> See Krauskopf, *supra* note 4, at 328.

<sup>71</sup> See Ramachandran, *supra* note 4, at 1794 n.21 (noting that men "may suffer distress at equal or even greater rates, but may simply be less likely to report such traditionally feminine indicia of psychological distress").

<sup>72</sup> See Homer, *supra* note 13, at 33.

<sup>73</sup> See Sandra Janoff, *The Influence of Legal Education on Moral Reasoning*, 76 MINN. L. REV. 194, 217, 222, 226-34, 238 (1991).

<sup>74</sup> See Torrey, *supra* at note 68, at 797 (noting that "substantial numbers of men are also being deprived of a quality legal education").

<sup>75</sup> See Symposium, *Missing Questions: Feminist Perspectives on Legal Education*, 45 STAN. L. REV. 1547, 1548 (1993) (noting that many law school professors recognize the failure of law schools to adequately prepare students for the professional world).

<sup>76</sup> *Id.* at 1559 (describing how the abilities that legal education overlooks are those most important to the actual practice of law).

<sup>77</sup> See *id.* at 1554 (discussing how the dominant paradigm for legal education that focuses on the Socratic Method and doctrinal analysis is not "an effective way of teaching skills that are most essential to effective legal practice").

<sup>78</sup> See *id.* at 1558-59 (noting that efforts to address interpersonal or emotional dimensions of the legal practice are absent in law school); see also Ann Shalleck, *Constructions of the Client Within Legal Education*, 45 STAN. L. REV. 1731 (1993) (noting that clients are "mostly absent from classroom discussions").

<sup>79</sup> See Guinier, *supra* note 2, at 13 (describing how lawyering requires more diverse perspectives and skills than those currently being taught in law schools).

<sup>80</sup> See Law School Admission Council/Law School Admission Services, *LAW AS A CAREER: A PRACTICAL GUIDE* 17 (1993) (stating that many lawyers do not litigate at all); see also A.B.A., *THE STATE OF THE LEGAL PROFESSION* 15 (1991) (showing that the majority of lawyers in private practice spend 0 to 20 percent of their time in the courtroom and finding that only 16 percent of lawyers in private practice are employed by firms comprised of more than ninety lawyers).

<sup>81</sup> See Guinier, *supra* note 2, at 10.

<sup>82</sup> *Id.* at 11 (noting that conventional pedagogy "may not be up to the task" of training students how to be lawyers).

<sup>83</sup> See A.B.A., *NARROWING THE GAP: LEGAL EDUCATION AND PROFESSIONAL DEVELOPMENT-AN EDUCATIONAL CONTINUUM*, 1992 A.B.A. Sec. Legal Edu. & Admissions B. 138.

<sup>84</sup> See Sturm, *supra* note 7, at 139 (describing the way in which lawyers need to be able to "facilitate collaborations between diverse groups of professionals and clients").

<sup>85</sup> See Symposium, *Missing Questions: Feminist Perspectives on Legal Education*, *supra* note 75, at 1564 (suggesting that law schools committed to teaching more empathetic lawyering would further feminist agendas and produce more

## ENDNOTES CONTINUED

capable attorneys).

<sup>86</sup> See Torrey, *supra* note 68, at 803 (noting that there is no evidence that men learn best from the Socratic Method).

<sup>87</sup> See Symposium, *Missing Questions: Feminist Perspectives on Legal Education*, *supra* note 75, at 1563 (recommending that law schools adopt a more interactive model of teaching that gives students a better idea of real-world practice).

<sup>88</sup> See Rosato, *supra* note 39, at 41 (criticizing the Socratic Method for failing to provide students with answers and, instead, humiliating them).

<sup>89</sup> See Symposium, *Missing Questions: Feminist Perspectives on Legal Education*, *supra* note 75, at 1563 (suggesting that small discussion groups would break down large classes in a way that would foster interpersonal skills).

<sup>90</sup> Susan Sturm & Lani Guinier, *Learning From Conflict: Reflections On Teaching About Race and Gender*, 53 J. LEGAL EDUC. 515, 528 (2003) (asserting that alternative teaching formats encourage brainstorming and innovative problem-solving).

<sup>91</sup> See Symposium, *Missing Questions: Feminist Perspectives on Legal Education*, *supra* note 75, at 1563 (arguing that less emphasis on doctrinal analysis and more emphasis on socially contextualizing the law could lessen gender inequity).

<sup>92</sup> See Deborah L. Rhode, *Midcourse Corrections: Women In Legal Education*, 53 J. LEGAL EDUC. 475, 488 (2003) (suggesting that these topics should receive more effective treatment in legal education).

<sup>93</sup> See Symposium, *Missing Questions: Feminist Perspectives on Legal Education*, *supra* note 75, at 1563-64 (asserting that law schools need to provide a more diverse analysis of legal structures).

<sup>94</sup> *Id.* at 1564 (noting that the way in which law schools "stir women in" is falsely represented as curricular diversity).

<sup>95</sup> *Id.*

<sup>96</sup> See Shalleck, *supra* note 78, at 732 (arguing that law schools should emphasize legal ethics and interpersonal skills to teach students about lawyer-client relationships).

<sup>97</sup> *Id.* at 1741 (noting the failure of lawyers to relate to their clients).

<sup>98</sup> See Mary L. Clark, *The Founding of the Washington College of Law: The First Law School Established By Women For Women*, 47 AM. U. L. REV. 613, 674-75 (1998) (describing the rise in scholarship identifying gender inequity in law school in response to the increasing number of women in law school).

<sup>99</sup> See Sturm, *supra* note 7, at 121 (describing how the "gladiator" model of lawyering and legal education hurts women).

<sup>100</sup> See Ramachandran, *supra* note 4, at 1794 (asserting that current feminist legal theories essentialize gender differences).

<sup>101</sup> See *id.* at 1789 (explaining how defining what is feminine risks sex-stereotyping a highly diverse group of women).

<sup>102</sup> See Rosato, *supra* note 39, at 39 (suggesting that advocating the need to make law school more accommodating to women could send the message that women do not belong in law school at all).

<sup>103</sup> See Torrey, *supra* note 68, at 813 (suggesting that law school is harming men and women as students and professionals).

<sup>104</sup> See Sturm, *supra* note 7, at 126 (describing how miners brought canaries into the mine to indicate the level of toxicity and when the canaries got sick, it was indicative of the fact that the environment was toxic for everyone).

<sup>105</sup> See *id.* at 122 (arguing that the "one-size-fits-all gladiator" model does not adequately prepare students to meet diverse professional demands).

<sup>106</sup> See Symposium, *Missing Questions: Feminist Perspectives on Legal Education*, *supra* note 75, at 1548 (asserting that improving legal education to better prepare students for the professional world would lessen gender inequity).

### *Announcing*

**FEBRUARY 4, 2009**

**3:00 pm – 8:00 pm**

### **The First Annual Lambda Law Society Symposium on Marginalized Issues in the LGBT Community: Race, Class and Domestic Violence**

The symposium seeks to offer a forum to discuss marginalized issues faced by many in the LGBTQ community both nationally and in our nation's capital. This year's symposium will begin with a panel on Domestic Violence in LGBTQ relationships. A second panel will follow entitled "Out on the Street," which focuses on issues facing low-income and minority LGBTQ in the Washington D.C area. The symposium will conclude with an alumni dinner.

# BANDING TOGETHER: REFLECTIONS ON THE ROLE OF THE WOMEN'S BAR ASSOCIATION OF THE DISTRICT OF COLUMBIA AND THE WASHINGTON COLLEGE OF LAW IN PROMOTING WOMEN'S RIGHTS

By  
Jamie Rene Abrams and Daniela Kraiem\*

The Washington College of Law and the Women's Bar Association of the District of Columbia share an important historical connection; Ellen Spencer Mussey and Emma Gillett founded both institutions together, in 1898 and 1917, respectively. Mussey and Gillett were pioneers in legal education, legal reform, and the development of women lawyers.<sup>2</sup> More significant than the work they performed during their lives, however, is the legacy of activism, reform, and support that they ignited by founding two institutions that advance women in the law. These institutions have trained and supported generations of women lawyers through world wars and depressions, through the abeyance and resurgence of the women's movement and the ensuing backlash, and through the dramatic changes in the legal profession and legal education that accompanied these events. We celebrate and explore their legacy in this essay.

Sensing the importance of their work, the Women's Bar Association of the District of Columbia ("WBA") and the Washington College of Law ("WCL")<sup>3</sup> preserved their institutional histories. Yet, preserving these documents in a cardboard box or back room rendered them – and with them the unique relevance of both institutions – isolated and known by only a few. This issue of *The Modern American* commemorates the "Shared History" project to preserve these archived documents, to house these physical documents in the WCL library, and to display them to the public in hard and digitized format, an effort that has both symbolic as well as practical significance.

The WBA's historical materials include correspondence, board minutes, newsletters, and photos compiled in informal scrapbooks and formal archive files (collectively, the "WBA Archives").<sup>4</sup> The WBA Archives tell the story of the WBA's historic efforts to secure property rights for women, to champion the Equal Rights Amendment, to fight discrimination, to achieve fair pay, to support women lawyers, and to catapult women into public leadership positions – a virtual rendition of women's legal history from the perspective of one organization. WCL has its own archives, containing documents, yearbooks, graduation announcements, and advertisements (collectively the "WCL

Archives"). The WCL Archives tell the story of a fledgling feminist institution that struggled for legitimacy, achieved the stature of a respected (albeit much less feminist) law school, and later rediscovered both its feminist and internationalist roots.

The archived documents revealed several strong themes that we explore in this essay. First, historians divide the broader feminist movement into a first and a second wave with a period of abeyance in between. We noted that the work of women lawyers associated with the WBA continued unabated even when the women's movement was not generally active, indicating that the WBA played a part in keeping the women's movement alive during its darkest days. Second, the legacy that Mussey and Gillett began when they founded WCL and the WBA was a collaborative one, a feminist legal method that has great lessons for our work today. Third, while women lawyers have made dramatic strides in a century – graduating from law schools at over

fifty percent today and breaking into careers in the public, private, and non-profit sectors,<sup>5</sup> the institutions that support women lawyers nonetheless exist under objectives virtually identical to the ones that Mussey and Gillett espoused ninety years ago. This tells us that Mussey and Gillett, and the law teachers, students and lawyers who joined them, hit upon something critical: a need for women lawyers to work together not only as lawyers, but as women.

We begin in Section I by placing the origins and missions of the WBA and WCL in historical context. Mussey and Gillett articulated three core pillars in the founding documents of the WBA: (1) the administration of justice; (2) the advancement of women attorneys; (3) and the social and professional support for its members. In Section II, we use these three pillars as the framework for a historical analysis of the activities of these institutions, focusing on the WBA.<sup>6</sup> Section III looks at the road ahead for women lawyers. It considers how we can use the legacy left by Mussey and Gillett to inspire a methodical, strategic, focused, collaborative, and inclusive response to today's challenges, such as advancing women to the highest ranks of the profession and creating a meaningful inclusion for all women in legal education and practice. We hope that the WCL and WBA Archives will ignite the dialogue necessary to achieve meaningful change and inspire the ongoing success of women in the law.

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*"Providing such a legal education  
for women as will enable them to  
practice the legal profession"  
—Article of Incorporation, Wash-  
ington College of Law (1898).<sup>1</sup>*

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## ORIGINAL MISSIONS

Buried in the archives at WCL is its Article of Incorporation dated 1898. Its plainly worded statement of purpose belies a number of radical ideas. Mussey and Gillett founded the co-educational Washington College of Law to educate women for the practice of law at a time when the very notion of formal legal education was new. Most lawyers at that time received training through an apprenticeship, which had the effect of excluding many women, immigrants, and members of minority groups.<sup>7</sup> It was almost unheard of for women to study law. Indeed, four out of the five law schools in Washington, D.C. would not admit women.<sup>8</sup> And women generally could not find apprenticeships unless they practiced in a family law firm.<sup>9</sup>

To contextualize the formal legal education of women in 1898, female lawyers could argue in court, but were not permitted to serve on a jury in the District of Columbia.<sup>10</sup> Although trained in the same constitutional and common law as their male colleagues, women could not vote.<sup>11</sup> The federal government employed a number of female attorneys, but it was not until 1896 that women in the District of Columbia could hold property in their own names after marriage.<sup>12</sup>

Yet, both Mussey and Gillett had successful law practices in Washington D.C. when they founded WCL. Mussey trained and practiced with her husband, and kept his international law and business practice for almost forty years after his death.<sup>13</sup> Gillett apprenticed under Belva Lockwood,<sup>14</sup> the first woman to practice in front of the United States Supreme Court.<sup>15</sup> Gillett later graduated from Howard University Law School, the only institution in Washington D.C. that trained women at that time.<sup>16</sup> She practiced in a variety of fields, focusing mainly on what she called “office work,” now termed transactional work.<sup>17</sup>

Mussey and Gillett incorporated lessons from their personal and professional experiences into the law school structure. From the outset, the school took the lived reality of its female students into account. The founders set the cost of tuition as low as possible to enable women, who often had little income, to attend. They raised funds for scholarships for low-income students.<sup>18</sup> They offered night classes to accommodate working women.<sup>19</sup> They even allowed one student to enroll under a pseudonym because she feared her family would ostracize her for studying law.<sup>20</sup> Significantly, WCL’s early yearbooks and newsletters show how Mussey and Gillett created an environment where women could study and teach law without being isolated.

The WCL Archives illuminate the trailblazing accomplishments of the law school’s early years. Mussey served as the first female dean of a law school,<sup>21</sup> Gillett the second.<sup>22</sup> The school graduated six women in the inaugural class of 1899; by the 1920s it averaged approximately fifteen female students in its graduating classes. Several female students and faculty members wrote the first law textbooks authored by women.<sup>23</sup> Early graduates went on to become some of the first female customs agents (which was fairly scandalous because it involved inspect-

ing ships at sea,) government attorneys, and even judges.<sup>24</sup> The school also trained women from abroad. Some of the first women to study law from countries such as Mexico, Sweden, and Uruguay, were graduates of WCL.<sup>25</sup>

While Mussey and Gillett were pioneers of the formal law school, a new form of entry into the legal profession, the school was standard in many other ways. Beyond the radical fact of the school’s existence, and Dean Gillett’s “caustic comments on dower and some of the other provisions of the common law whereby women were ‘protected,’”<sup>26</sup> not much indication exists that WCL faculty taught law any differently than other law schools. Indeed, it seems unlikely since they strove for legitimacy as not only a female-run, but also a part-time institution. Thus, while the act of founding the school was radical, and their support for formal legal education progressive, Mussey and Gillett’s approach to education was consistent with that of their contemporaries.

The materials in the WCL Archives also reveal that the school, while radical in its acceptance of women in all aspects of legal practice and from many nations, remained mired in the prevailing views on racial segregation. WCL excluded African-Americans for over fifty years.<sup>27</sup> The relationship of the founders and early graduates to the issue of racial discrimination is complex.<sup>28</sup> Mussey’s biography indicates that she was the daughter of ardent abolitionists and grew up in a home that served as a station on the Underground Railroad.<sup>29</sup> However, advertisements for the school through at least 1914, specifically pointed out that it was for whites only,<sup>30</sup> presumably to make it more attractive to white women than Howard University Law School. The rhetoric softened slightly around the time when WCL admitted a Native American woman, but it would be many decades before the school took the first steps to remedy the injustice against African-Americans.<sup>31</sup>

### A. WOMEN’S BAR ASSOCIATION OF THE DISTRICT OF COLUMBIA

*“Professional women cannot rise one at a time – they must rise in groups.”*

— Ellen Spencer Mussey, First Annual Address of the WBA

Nineteen years after the founding of the school, women still faced overt discrimination in the practice of law even as they entered the profession at an increasing rate.<sup>32</sup> The D.C. Bar Association, the professional association that supported male attorneys, excluded women.<sup>33</sup> Left without the support of a professional organization, it was up to the women to found their own.

Mussey and Gillett sent invitations on WCL Alumni Association letterhead to all of the female lawyers barred in the District of Columbia.<sup>34</sup> On May 19, 1917, just after the United States entered World War I, Mussey and Gillett convened a meeting at WCL to form the WBA.<sup>35</sup> Those present elected Mussey as their first president.<sup>36</sup> The WBA’s original constitution stated its mission:

The object of this Association shall be to maintain the honor and integrity of the profession of the law, to increase its usefulness in promoting the administration of justice; to advance and protect the interests of women lawyers of the District of Columbia; and to encourage their mutual improvement and social intercourse.<sup>37</sup>

The steady growth of the WBA indicated that it filled an acute need for women lawyers in D.C. The WBA began with thirty-one charter members.<sup>38</sup> In her first annual address in May of 1918, Mussey boasted that the WBA, then with forty members, had enrolled forty percent of its eligible members in less than a year, while the D.C. Bar Association to which almost *all* male attorneys were eligible, had only 300 members after thirty years in existence.<sup>39</sup> By May 1920, the WBA's third year of existence, Mussey put the WBA in context when she said: "There are older and larger associations of women lawyers in the country, but without boasting, we can truthfully claim that none of them is more active, more harmonious, or more alive to its responsibilities than our own."<sup>40</sup> Membership continued to grow steadily, with 250 members in 1936,<sup>41</sup> 358 in 1944,<sup>42</sup> 427 in 1949,<sup>43</sup> 600 in 1966,<sup>44</sup> and 1,100 in 1982.<sup>45</sup> The WBA's mission today is nearly identical to its original language: "Maintaining the honor and integrity of the profession; promoting the administration of justice; advancing and protecting the interests of women lawyers; promoting their mutual improvement; and encouraging a spirit of friendship among our members."<sup>46</sup>

WCL and the WBA maintained important connections, particularly in the early years. The WBA held many of its early meetings at WCL.<sup>47</sup> One of the WBA's early initiatives was an ongoing scholarship program for female students attending WCL

(often at the behest of Mussey),<sup>48</sup> and it contributed to the early building fund drives (often at the behest of Gillett).<sup>49</sup> Mussey and Gillett both served as WBA Presidents<sup>50</sup> and WCL Deans.<sup>51</sup> Our non-systematic review of the archives turned up other important figures who bridged the two institutions, including Eliza-

beth Harris (WBA President, WCL graduate), Grace Hays Riley (active WBA member, WCL Dean), Ida Moyers (WBA President, WCL graduate), Helen Jaimison (WBA President, WCL Professor), Burnita Shelton Matthews (WBA President, WCL Professor), Karen Lockwood (WBA President, WCL graduate, WCL Adjunct Professor), and Jennifer Maree (current WBA President, WCL graduate).<sup>52</sup>

## PROGRESS MEASURED

The continuing legacy of these institutions is one of activism in pursuit of social and legal reform. Mussey and Gillett founded the WBA on three core pillars: the administration of justice; the advancement of women lawyers; and professional and social support for women lawyers. We consider each pillar in turn as a framework to analyze the achievements and significance of these institutions. Though innumerable themes emerge, this section highlights only a few. First, while the broader feminist movement abated during certain points in history, the WBA continued to work for the betterment of women lawyers and women in the law. Second, these institutions have advanced the rights of women through collaboration. Third, while the legal reforms these institutions accomplished are truly remarkable, perhaps their most timeless and enduring quality is the profound need their professional and social support for women lawyers fills.

### A. THE ADMINISTRATION OF JUSTICE

One of the most captivating aspects of the archives is the record of legislative and administrative advocacy by the WBA and the faculty and administrators of WCL. While WCL itself did not engage in advocacy as an institution, there is no doubt that Mussey used her position as the Dean of the school, as well as her status as a well-respected lawyer in the community, to

advocate for women's rights legislation as well as other social policies. Gillett also did considerable legislative work, although she does not appear to have been as fond of testifying in public as Mussey eventually became.

To put this into context, Mussey, who became one of the most experienced lobbyists on behalf of women's rights, did not dare speak in public until well into her forties for fear of social scandal.<sup>53</sup> Prior to the founding of the bar association or the law school, Mussey and Gillett worked together on the passage of legislation (later called the Mussey Bill) granting women the right to hold property in their own name after marriage, granting mothers the same rights as fathers in custody disputes, and safeguarding dower rights.<sup>54</sup> At that time, Gillett was also a local leader of the woman suffrage movement.<sup>55</sup> Mussey appears to have been a late convert to the cause of woman suffrage, but a trip to Norway, where women already had the right to vote, convinced her that the franchise was essential if women were to receive any consideration from lawmak-

*while the broader feminist movement abated during certain points in history, the WBA continued to work for the betterment of women lawyers and women in the law.*

ers.<sup>56</sup> By 1910, she testified in front of a Senate Committee “to make a plea for the ballot.”<sup>57</sup>

## 1. THE END OF THE FIRST WAVE: 1917-1925

By the end of the first wave of the woman’s movement, WBA members and WCL faculty routinely appeared in the halls of power to make demands for their rights and the rights of others. Because of their location in Washington D.C. and their personal and professional contacts with members of Congress and various administrations, the women of the WBA were often the local face of the national women’s movement. Although it took many years and several generations of lawyers, the association participated actively and powerfully in each step of the slow dismantling of legalized discrimination against women.

In her inaugural annual address as president of the WBA, Mussey noted that the charter members organized the WBA after a dinner to honor the men who had marched with women lawyers at the 1913 suffrage parade,<sup>58</sup> which had turned violent.<sup>59</sup> The WBA formed just prior to the ratification of the woman suffrage amendment. After its first few years, the association turned to advocacy on other aspects of women’s rights. They supported bills to allow women to retain their own nationalities after marriage to a non-U.S. citizen,<sup>60</sup> to eliminate the legal restrictions on the contractual capacity of married women,<sup>61</sup> and to allow women to serve on juries.<sup>62</sup> Also concerned with social welfare, WBA members supported measures for compulsory education and reduction of child labor in D.C.,<sup>63</sup> as well as funding to reduce maternal mortality.<sup>64</sup> They supported resolutions calling for suffrage for D.C. residents, because despite having won themselves the right to vote as women, they still found themselves disenfranchised because of their status as residents of D.C.<sup>65</sup>

## 2. SURVIVING IN ABEYANCE: 1925-1965

Historians often point to a period of “abeyance” in the women’s movement between the passage of the suffrage amendment in 1920 and the start of the second wave of the women’s movement in the 1960s.<sup>66</sup> Especially after World War II, most middle class women did not work outside of the home. Women’s rights, which had been a hot-button issue for decades, faded from public debate.

The status of women at WCL reflects the decline of the women’s movement. As the founders and original graduates passed away, the memory of the school’s early radicalism faded. The school appointed its first male dean in 1949, perhaps to smooth the merger with American University in 1950.<sup>67</sup> Like most law schools of the time, WCL continued to admit women, although in small numbers. In a more positive reflection of the

changing times, it finally admitted its first African-American student in 1950.<sup>68</sup>

The WBA, however, remained strong and active in the period stretching from just before World War II to the 1960s. Indeed, the WBA Archives suggest that the WBA served as one of the movement structures bridging the first and second waves of the women’s movement.<sup>69</sup> The WBA continued to recruit young members, and even started a new “junior” division in the 1930s.<sup>70</sup> In contrast, most feminist organizations in this time period were increasingly populated by older women who had been part of the struggle for suffrage prior to 1920.<sup>71</sup>

Although many activists left the women’s movement after the passage of woman suffrage, the WBA sponsored a bill for gender parity in inheritance laws introduced in Congress in the late 1920s.<sup>72</sup> The WBA also endorsed bills to remove exemptions for women from jury duty.<sup>73</sup> By the 1930s, the WBA finally succeeded in having Mrs. Mussey’s legislation restoring women’s citizenship after marriage to a non-U.S. citizen signed into law.<sup>74</sup> The WBA also published a comprehensive report on the International Court of Justice that was incorporated into the

record of the Senate debates on the matter.<sup>75</sup>

Two points are critical to the importance of the WBA in the period between the first and second waves of the mass women’s movement. First, the women who practiced law were still a small minority in the legal community, and the WBA Archives reveal that they remained concerned about discrimination against women, especially in govern-

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ment employment.<sup>76</sup> Public opinion of women who worked for wages outside the home ranged toward the cruel. Popular books labeled feminists “severe neurotics responsible for the problems of American society.”<sup>77</sup> The WBA served to protect its working women members from the stings of such attacks by legitimizing their work in the public sphere.<sup>78</sup>

Second, the WBA’s membership developed the skills to lobby for legislation and the appointment of women to the judiciary and political positions. The WBA, throughout even the most politically conservative 1950s and early 1960s, never stopped taking positions on legislation. In the 1950s, the WBA supported the creation of a Legal Aid Society for the District, promoted a family division in the Municipal Court, and submitted a report (a provision of which was later incorporated into the legislation) abolishing dower and courtesy in the District.<sup>79</sup> In the mid-sixties, the WBA endorsed the elimination of rules allowing the federal government to specify “men only” when selecting employees to serve under the Civil Service program.<sup>80</sup> In 1965, WBA members testified in support of divorce reform in the District, as well as in support of laws affirming that there

should be no discrimination as to sex in Federal Agencies' hiring practices.<sup>81</sup>

Members of the WBA were experienced at testifying before Congress in part because matters affecting the District of Columbia came before Congress, rather than a state legislature.<sup>82</sup> In a gem of a letter from the WBA Archives, 1960-1961 President Ruth Joyce Hens<sup>83</sup> described the work of the WBA to a woman interested in organizing an association of women lawyers in Kentucky:<sup>84</sup>

Because of our proximity to Congress, legislation affecting the law,  
the rights of women, the impact on the citizens of  
the District of Columbia,  
is important to our Association. We propose  
legislation, we study legislative proposals espoused by other organizations or individuals, and we testify  
on those matters before appropriate Congressional Committees, giving  
our views and recommendations.<sup>85</sup>

Considering that few women possessed the skills to testify in Congress in 1950's America, the fact that this was the primary activity of the Association is remarkable when seen in context.

These skills proved vital when the mass women's movement resurged in the 1960s and 1970s. WBA members knew how to lobby and exert political influence, and they possessed insiders' knowledge of Washington politics. When the women's movement was almost ready to erupt again on a mass scale in the 1960s, vocal members of the WBA moved it forward. Although not official business, the original White House Press Release regarding the founding of the Federal Committee on the Status of Women<sup>86</sup> is tucked into the minutes of the WBA because WBA member Marguerite Rawalt served on the Citizen's Advisory Commission to that Committee.<sup>87</sup> There are invitations to a meeting of Women's Organizations of D.C. in 1966, convened by the WBA, to demand that the D.C. Commissioners create a Commission on the Status of Women for the District of Columbia.<sup>88</sup> While not necessarily radical feminist action, this activity nonetheless reflects momentum towards women's equality that perhaps only professional working women could have contributed to, in this era.

### 3. *THE SECOND WAVE AND BEYOND: 1965-PRESENT*

There is evidence of continued WBA activity from the 1960s to the present in the archives. The WBA continued to work on issues pertaining to women and the law, and by the mid-1960s, they had gained more allies. The WBA continued to push for legislation that would enhance the lives of women. The mass women's movement, and the role of lawyers in the movement, shifted into high gear. The WBA counts among its members many legal pioneers, including several of the women who

founded and staffed some of the most powerful women's rights organizations in the country, including the Women's Legal Defense Fund.<sup>89</sup> As litigation assumed a more prominent role in movement strategy, the WBA took on the role of drafting and signing onto amicus briefs. The WBA has influenced policies on everything ranging from family medical leave to most recently, employment discrimination.<sup>90</sup>

## ***B. ADVANCING AND PROTECTING THE INTERESTS OF WOMEN LAWYERS***

### *1. A ROOM OF THEIR OWN AND A SEAT AT THE TABLE: THE WBA'S ROLE IN MEETING THE NEEDS OF WOMEN LAWYERS*

Like the early WCL efforts to open the profession to women described in Section I, early WBA efforts to advance and protect the interests of women lawyers often involved basic access to the profession itself – literally opening doors and finding space for women lawyers to practice their trade. One of the WBA's earliest efforts to support practicing attorneys was the creation of a room of their own – the Women Attorney's Room in the District of Columbia Court House. The WBA women discussed stocking, decorating, and cleaning this room regularly, and allocated considerable amounts of money to the project.<sup>91</sup> The Women Attorney's Room created a space for women at the courthouse to study, conduct research, meet, and prepare court documents.<sup>92</sup> A 1936 letter in the WBA Archives describes the room as "the only pleasant place in the Court House, besides the hall-ways, where women lawyers feel free to wait or meet, pending the hearing of their cases."<sup>93</sup>

In other cases, the WBA was literally seeking a seat at the table. Another of the WBA's first official acts of business in 1917 was a discussion regarding the need to pursue law library access for women lawyers, who at the time were not allowed into the D.C. Bar Association library.<sup>94</sup> A report on the 1919 ABA meeting notes that WBA members were the first women to sit at a banquet of the American Bar Association, despite the fact that some pioneering women had been in the legal field for decades.<sup>95</sup>

Early WBA efforts also included securing access to the formal education that was, by that point, practically required for entry into the profession. By the 1920s, several schools in the area admitted women and the WBA awarded one full law school scholarship every three years and two pre-legal scholarships.<sup>96</sup> The WBA offered both financial support to these students<sup>97</sup> as well as professional support, staying in active contact with the recipients to ensure their success in school.<sup>98</sup>

### *2. THE NEXT STEP: PROMOTING FEMALE LEADERSHIP IN THE PROFESSION*

The WBA Archives tell the story of an unrelenting commitment on the part of the organization to support the appointment



of women to “positions of public trust.”<sup>99</sup> Its geographic, political, and social location in Washington, D.C. meant that the WBA was one of the primary voices for the inclusion of women in the federal government. As early as 1922, the WBA was gathering data to survey the representation of women in legal positions in the government, investigating problematic departments and demanding accountability.<sup>100</sup> The WBA methodically identified open positions, and encouraged members to apply or identified people to formally nominate them.<sup>101</sup> The WBA sent letters and requested meetings with decision-makers, including the President of the United States,<sup>102</sup> to encourage them to appoint or hire the WBA-endorsed candidates.<sup>103</sup>

The WBA campaigned “to obtain effective publicity, to interest influential persons, and to create a favorable public sentiment.”<sup>104</sup> Occasionally, the campaigning required public battles with agency heads who refused to hire women. In 1934, the WBA passed a resolution calling for the resignation of the District Attorney after he went public about his refusal to hire female Assistant District Attorneys, in part on the grounds that the previous female Assistant District Attorneys had spent too much time “worrying about canned goods”<sup>105</sup> (no doubt prosecuting violators of newly enacted food safety laws) and “hunting up fleeing husbands for distracted wives”<sup>106</sup> (likely attempting to enforce support obligations.)<sup>107</sup>

For some time, advocacy on behalf of female lawyers operated on a position-by-position basis.<sup>108</sup> In response to the WBA’s expanded membership base by the 1960s, it began a placement service to act as a “clearing house to advise those interested as to where positions are available.”<sup>109</sup> The WBA also formalized its endorsement proceedings by convening a committee and developing a formal Policy Statement Respecting WBA Endorsement for Public Office.<sup>110</sup>

The Association also lobbied for women to represent the United States in international legal proceedings. After a call by WBA representatives at the State Department, the President appointed a woman to the American Delegation to the Conference on the Codification of International Law in the Hague.<sup>111</sup> The WBA itself also sent delegates to meetings of the Inter-American Bar Association for many years.<sup>112</sup>

### 3. EXPANDING ADVOCACY NETWORKS

Following decades of activism for women lawyers, the role of the WBA as an advocacy organization in society also evolved in important ways. The founders intended that the WBA provide professional support to women lawyers. They also founded the Association at a climactic time in the woman suffrage movement. These dual functions placed the WBA at the intersection of at least two distinct and important advocacy networks – advocating as a professional association for lawyers and advocating for women’s rights. In these layered advocacy roles, the WBA has a rich history of establishing and cultivating formal and informal connections with other groups to advance professional women on certain issues, to advance lawyers and the legal pro-

fession in other settings, and to advance women’s rights in other contexts. For example, since its early years, the WBA has had standing committees to work with organizations that shared the WBA’s focus on promoting the rule of law and the efficient administration of justice, including the D.C. Bar Association, the American Bar Association, the Federal Bar Association, and the Inter-American Bar Association.<sup>113</sup>

The WBA also formed a node in the women’s rights advocacy network, focusing on using legal tools to achieve women’s equality and advancement in the profession. As early as 1920, records emerge of the WBA’s involvement in a nationwide conference of women lawyers.<sup>114</sup> In 1930, it formally voted to pay a group membership to affiliate with the National Association of Women Lawyers (“NAWL”), and many WBA members have also been active in NAWL throughout the decades.<sup>115</sup> WBA members often acted in conjunction with the Women’s Business and Professional Association of D.C., especially when that organization was under the leadership of active WBA member Marguerite Rawalt.<sup>116</sup> Several prominent members of the WBA, including Emma Gillett, Rebekah Greathouse, and Judge Burnita Shelton Mathews, were also active in Alice Paul’s National Women’s Party.<sup>117</sup>

### C. Professional and Social Support Functions

Today, just as in 1917, it is impossible to separate the social support function of the WBA from its goals of advancing women lawyers and developing professional skills. When women lawyers interact, whether casually or formally, it serves to advance individual lawyers and the profession. Since its founding, one of the WBA’s formal goals has been to promote the professional development and social interaction of women lawyers. The 1917 constitution states that the WBA’s purpose includes the “mutual improvement and social intercourse” of women lawyers in the District of Columbia.<sup>118</sup> Interestingly, documents in the WBA Archives indicate that this prong of the WBA’s mission was likely added as a line-edit to a draft of the temporary constitution.<sup>119</sup> The WBA’s current constitution articulates this continued focus on “promoting [women lawyers’] mutual improvement and encouraging a spirit of friendship among our members.”<sup>120</sup>

#### 1. TO BE SIMPLY UNDERSTOOD: LENDING SUPPORT IN MALE-DOMINATED PROFESSIONS

*For what can be so refreshing to an aspiring soul that has been stifled under narrow conventionalism, as to be simply understood?*<sup>121</sup>—  
Martha K. Pierce (early woman lawyer)

The WBA Archives tell us of the timeless and persistent need for social support among women lawyers. When the roster of women lawyers in the WBA tallied thirty-one, this need was sharply pronounced, and was for many women a matter of pro-

fessional survival. The isolation felt by the first female lawyers was likely intense as they negotiated a delicate balance between prevailing notions of femininity and their public professional role.<sup>122</sup>

Embedded in the loneliness of charting a new path for women were the more concrete concerns about the practice of law, their clients' expectations, and their family lives that perhaps only another female lawyer could comprehend. Early women lawyers faced questions about women's physical fitness for the practice of law, appropriate behavior (and dress) in the courtroom, and the logistical and social challenges of accommodating children and marriage into a life that also included a professional and public career.<sup>123</sup>

The early WBA provided women lawyers with the companionship and support of other women who simply understood. The WBA Archives reveal that in its first years, social gatherings were an interesting blend of private intimacy and public exposure, organic institutional programming and social hosting. There was an early tradition of private monthly dinners, a tradition which emerged formally in the late 1920s, but appears from the records to have continued for some time.<sup>124</sup> The terse notes and budgetary allocations do not reveal much about these private dinners, their location, the attendees, or the discussions had there, but it is difficult to overlook their vital importance in keeping these pioneering women connected, informed, and supported.

WCL's parallel role providing social support for women law students and law teachers is evident from the first yearbooks, announcements, and newspapers of its early era. Women who attended other law schools were often the only female members of their class, and faced years of education with only male classmates and all male instructors. Especially in the hyper sex-segregated world that existed around the turn of the century, this meant that women studied law in relative isolation, at home with neither their male peers, or their female friends and family members.

Since its inception, WCL has been co-educational, and employed many male faculty members.<sup>125</sup> But, at least in its early years, women could feel confident that they would not be subjected to the ridicule or resistance found at other schools.

Many of these women would find female mentors and role models at WCL.

WCL also offered female law teachers a fellowship and opportunities that simply did not exist elsewhere. In her authoritative and comprehensive article on the history of WCL, Professor Mary Clark notes that the presence of more female faculty

members renders a school more welcoming to its female students.<sup>126</sup> It follows that the mere presence of other female faculty members at the turn of the century must have been a source of great social support to the first women law teachers.

In its first four decades, WCL provided an opportunity for women to serve as deans of a law school, a position of power that was not meaningfully open to other women until recently.<sup>127</sup> Additionally, the early yearbooks show that the women faculty members taught in all areas of the law, from common law subjects to international law. For example, in the 1940s, WBA member (and later Judge) Burnita Shelton Mathews taught evidence at WCL.<sup>128</sup> This is in stark contrast to the gradual increase of women in other law school faculties (which started only very slowly in the 1950s to employ women and did not accelerate until the late 1970s), where they tended to cluster women in fields such as law librarianship,<sup>129</sup> family law, trusts and estates, and legal writing rather than offering women opportunities across the legal curriculum.<sup>130</sup>

## 2. SOCIAL STATUS AND RECOGNITION

The social events also provided much needed public recognition to the women attorneys and their work. By the mid-1930's, entertainment comprised an average of forty-eight percent of the WBA's budget over a six-year average.<sup>131</sup> This is further evident from the regular Washington Post coverage of the WBA social events, especially the annual dinner,<sup>132</sup> which has always been a public occasion. The women tried to secure the WBA's place in Washington society with invitations to the President of the United States, Supreme Court Justices, Congressmen and women, and prominent speakers such as Pearl Buck. While attendance at the dinner was originally limited to women and women guests,<sup>133</sup> over time, the dinner expanded to include a large population of male attorneys. At the twentieth anniversary of the dinner in 1937, the report on the success of the dinner noted that fifty of the 250 attendees were men "of whom I am told 'came to scoff (or be bored) but remained – to be highly entertained.'"<sup>134</sup>

Over ninety years later, the need for "social intercourse" among women lawyers and the WBA's role in filling that need seems to have changed very little. The WBA's annual dinner continues today, including a 2008 address by Justice Ruth Bader Ginsburg where she was honored with the 2008 Reno Torchbearer Award,<sup>135</sup> attended by approximately 800 people<sup>136</sup> and sponsored by dozens of local law firms and businesses. The WBA also hosts annual judicial receptions, a golf classic, and specialty dinners for women corporate counsel, women partners, and senior women in government.<sup>137</sup>

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The WBA also played hostess over the years, entertaining various delegations of women attorneys, ranging from the ABA visits to Washington, to visits by lawyers from the Inter-

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*These dual functions placed the WBA at the intersection of at least two distinct and important advocacy networks – advocating as a professional association for lawyers and advocating for women's rights.*

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American Commission of Women.<sup>138</sup> The hostess function eventually yielded a formal Courtesy or Hospitality Committee.<sup>139</sup> In many instances, this often included the role of entertaining the wives of visiting officials.<sup>140</sup> Minutes from 1931, record a discussion regarding whether it was the WBA's responsibility to entertain the wives of lawyers. Those present at the meeting agreed to "accept the responsibilities for arranging" this entertainment – one of many examples where the minutes likely do not do justice to the richness of the issue.<sup>141</sup>

### 3. WOMEN'S SPACE: CULTIVATING FEMALE LEADERS

The social component of the organization is still thriving today, a telling reality when we consider the number of women in the profession today as compared to the WBA's early years. In 1920 there were 1,738 women lawyers and 1,711 women law students.<sup>142</sup> In contrast, women have been graduating law school at a rate of 40 percent or higher since 1985.<sup>143</sup> Along with the entry of more women into the profession, comes the opportunity for organic social interaction with other women in the traditional office setting as well as formal women's committees and initiatives.

But through these immense changes, the WBA's social functions have survived, which indicates that they serve a more complex purpose than contact with other women. At a minimum, the social interaction of organizations such as the WBA, offers modern lawyers a broad network of support, role models, mentors, and professional contacts.<sup>144</sup> Maybe they offer a space where a woman's femininity and her professional identity are reinforced rather than challenged.<sup>145</sup>

Even more powerfully, perhaps women professionals benefit from having a unique women's space where they can develop into leaders. The early members of the WBA faced the familiar tension between fighting for inclusion in power structures, while recognizing that a separate women's space was sometimes necessary because women's voices were often drowned out or devalued in those existing power structures. Even after the admission of women to the D.C. Bar Association, for example, it was many decades before women rose to prominent positions in the organization,<sup>146</sup> stunting women's opportunities to gain meaningful leadership experience – as heads of committees, organizers of campaigns, or officers in the organization.

In contrast, the WBA provided its members an opportunity to cultivate leadership and management skills. As sociologist Cynthia Fuchs-Epstein pointed out in her 1981 study of women in the legal profession, due to discrimination, women, who could often not "easily rise in the male-dominated bar organizations, [could] climb to positions of leadership in the women's bars ... some of the prestige attached to high office in them may be carried over into the male organizations and into the profession."<sup>147</sup>

It is important to acknowledge and consider, however, that the history of social support at the WBA and WCL failed to extend to women of color in many ways. As noted above, WCL did not accept African-American students until the 1950s. The

WBA minutes and notes do not note the race of the membership of its leadership, but this organization was certainly not racially inclusive, particularly in Jim Crow-era Washington. For example, a volume of the "The Woman Lawyer" from 1935 in the WBA Archives, contains simultaneously a proud profile of the WBA,<sup>148</sup> an advertisement for WCL,<sup>149</sup> and a racist joke that mocks the intelligence and understanding of the legal system of two men of color.<sup>150</sup> While there were only a handful of female lawyers of color at the time, the WBA and WCL's tolerance for the prevailing prejudice is unacceptable by modern standards.

### 4. TRAINING FOR THE FUTURE

As the WBA membership base expanded, the WBA Archives tell of an increased emphasis on professional development, demonstrating the organization's adaptability and ability to keep the organization relevant to a broader membership base. Beginning in the 1930s, the WBA Archives begin to show explicit professional development components to the meetings, merging business meetings with educational programs,<sup>151</sup> such as a talk on Chinese Women in the Law and a lecture on changes to the Federal Rules.<sup>152</sup> By the 1940s, the informal dinners that began many years earlier also started to include a speaker or discussion about a current topic.<sup>153</sup> Dinner speakers over the years covered topics such as the European recovery effort after World War II,<sup>154</sup> "Democracy's Chances in Japan,"<sup>155</sup> and investment strategies for professional women.<sup>156</sup> Many of these events reveal much about the political tenor of the time. For example, notes from a program on the Labor Relations Board in 1961 record the speaker telling his audience that lawyers have a responsibility to fight communism,<sup>157</sup> and topics in the 1980s included "work/family balance."

### THE ROAD WINDS UP: UNFINISHED BUSINESS FOR THE WBA AND WCL

Our review of the archives led us to one fundamental, yet critical, point. Women lawyers can, should – and indeed *must* – carry the baton as individuals and in organizations. In the words of Dean Gillett in her address to the Section of Legal Education of the American Bar Association in 1921,

I want to say... that the woman's day is here. The women are not yet at the top. Does the road wind upward all the way? Yes, to the weary end, and we women who are studying law and practicing law are not at the top yet. It is possibly just as well that the road should wind somewhat as we go up.<sup>158</sup>

## A. THE IMPORTANCE OF EXAMINING THE PAST

Gillett's words from 1921 still ring far too true today – women are not yet at the top of the path. As the road winds up, we look ahead for ideas and behind us for inspiration. It is our hope that this section will ignite that dialogue by highlighting why these Archives matter, what they tell us about the current challenges facing women in the profession, and where we go from there.<sup>159</sup>

The value of our shared history is best illustrated by WCL's own winding path. The WCL Archives have already rescued WCL's feminist history from obscurity once before, fundamentally changing the direction of WCL and perhaps providing a blueprint for continued work. By the 1980s there were no full time female faculty members, erasing the history and even memory of the pioneering women law teachers. Around this time, the then-WCL Director of Development was searching for a way to connect WCL with its alumni base, particularly in light of faculty turnover and the school's location on the American University Main Campus. The Director of Development went into the dusty WCL Archives looking for pictures of the old building. There, in antique photos, crumbling newsletters, and faded scrapbooks, he found the early feminist and internationalist roots of WCL; roots that he recognized made WCL a different kind of law school.

The faculty used this information to position WCL as the unique institution that it is today. They created a strategic vision emphasizing WCL programs in international law, clinical legal education, and women's legal studies. WCL faculty founded the Women and the Law Program and the Women and the Law Clinic. They supported the creation of a Journal of Gender, Social Policy and the Law. Faculty later founded the Center for WorkLife Law,<sup>160</sup> until recently housed at WCL, as well as the Domestic Violence Clinic. The faculty recruited and hired female scholars in all areas of the law and bolstered its faculty scholarship in the areas of gender and law. The students joined in the resuscitation of WCL's feminist roots. The Women's Law Association, with the support of the administration, started an annual "Founders' Day" conference, out of which has blossomed an extensive Spring series of over sixty conferences and events that form the centerpiece of WCL's contributions to discourse with the broader legal community. The Archives have proved their value once before.

What lessons do the Archives hold for us today? The Archives teach us that women lawyers used every advocacy tool at their disposal, primarily lobbying, litigating, and legislating to address *de jure* discrimination. We also see that the tools that

our predecessors used have not been as useful in addressing the more embedded barriers that exist today. Today, women face discrimination that is more entrenched and subtle. Traditional legal tools have not proven successful in advancing and retaining women in the highest ranks of the legal profession.<sup>161</sup> Eliminating cognitive bias, isolation, and the role of "preference" in hiring and promotion decisions requires new forms of advocacy, as well as new mechanisms of accountability.

Despite legal protections and great numbers of female law school graduates, there is strong evidence of discrimination against women in the legal profession. The National Association of Women Lawyers ("NAWL") points out that in the private sector "almost one out of two law firm associates is a woman, which approximates the law school population but at the highest level of law firm practice, equity partner, in the average firm only one out of six equity partners is a woman."<sup>162</sup> Within the

firm leadership structures, NAWL reports that women generally comprise only 15% of the seats on the law firms' highest governing committee, and 15% of firms have *no* women on their leadership committee.<sup>163</sup> Only 8% of all managing partners are women.<sup>164</sup> NAWL data also reveals an increasingly widening income disparity as women progress to the highest ranks of partnership.<sup>165</sup> The National Association of Law Placement reports that in law firms it surveyed, 10.07% of associates are minority women.<sup>166</sup> 1.65% of partners are minority women nationally.<sup>167</sup> The statistics in Washington, D.C. are only slightly better, at 10.33%

for minority associates and 2.11% for minority partners.<sup>168</sup> The ABA Commission on Women in the Profession's study, "Visible Invisibility," reported that less than 1% of minority women remained at law firms by their eighth year.<sup>169</sup>

Women are similarly underrepresented in the senior ranks of other legal sectors as well. According to the ABA's Commission on Women in the Profession, in 2006 women comprised 15.7% of General Counsels in Fortune 1000 corporations, 16.6 % of General Counsels in Fortune 500 corporations, and 23% of district court and circuit judges.<sup>170</sup> Women currently make up only 20.4% of law school deans, and 26.5% of tenured law school faculty around the nation.<sup>171</sup>

These challenges reinforce a continued demonstrable need for both the WBA and for the women's legal studies programming at WCL. And, to paraphrase Judge Burnita Shelton Mathews, a reason for women to "band together." It is noteworthy not only that Mussey and Gillett were *women*, but also that there were *two* of them. WCL legend has it that Mussey would not even consider opening the first Women's Law Class if Gillett would not co-teach.<sup>172</sup> It is also no coincidence that the WBA emerged in the aftermath of the pivotal woman suffrage parade in 1913, a classic form of collective action.<sup>173</sup> There is much rhetoric about the importance of working together, but the Archives provide a stark reminder that the women's movement

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*The WBA can leverage its organizational status to create pressure for reform in specific law offices that have high attrition, low promotion or part-time policy utilization rates, or insufficient family leave policies, to name just a few.*

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will not survive if we do not build coalitions strategically. In building a modern coalition to address the current needs of women in the profession, both the WBA and WCL have unique and irreplaceable roles to play.

## **B. THE WBA IS AS NECESSARY AS EVER**

The WBA remains relevant because it is uniquely positioned to find the next set of advocacy and accountability tools, to train future generations of women lawyers, and to maintain the steadfast focus on advancing the interests of women in the profession. The forces faced by women in the legal profession — the ones that push them out of law firms at alarming rates, and that keep them from entering the highest ranks of the profession — are not forces that will be changed by individual women working independently. Simply put, women's advancement in the profession is not another project for the WBA. It is *the* project, the very reason for its continued existence.

The WBA's position is unique in several ways, including its capacity to leverage the institutional power of the WBA to create accountability, the positioning of the WBA as an authoritative voice, and in continuing to build the capacity of individual women lawyers.

### **1. LEVERAGING INSTITUTIONAL POWER TO CREATE ACCOUNTABILITY**

Over the past ninety years, the WBA has banked institutional capital to wield for the benefit of women in the profession. The WBA can utilize this organizational clout by creating new norms for what is acceptable in the legal community. One way to change norms is by better using the publicly available data we already have documenting the current situation of women in the profession. While the data detailed above regarding the lack of women in leadership positions in firms are regularly cited as *proof* that women are not advancing to the highest ranks of the profession, their continual repetition may serve only to reinforce to employers that maintaining the status quo aligns them with the competitive market.

Instead, the WBA should use the data as an *advocacy* tool. The WBA can leverage its organizational status to create pressure for reform in specific law offices that have high attrition, low promotion or part-time policy utilization rates, or insufficient family leave policies, to name just a few. On the flip side, the WBA can also change culture by celebrating and recognizing firms that are identifying new and innovative strategies that work to retain and promote their female work force.<sup>174</sup>

For example, the WBA can promote and reinforce broader definitions of the "ideal worker." The traditional model of new attorneys following in lock-step to partnership pretends that all lawyers, all firms, and all legal jobs are all the same. In concrete terms, the WBA can work to open up the marketplace to attorneys who leave the job market for a limited period and return. In October 2008, WCL launched a Re-entry Program for law-

yers who have taken time out of the legal profession and who are searching for ways to re-enter. The WBA and NAWL co-sponsor the program.<sup>175</sup> The WBA as an organization and its members, particularly senior members and leadership, can advocate employers to hire talented re-entry applicants, and create employment policies that enable these workers to use their skills and experience. The WBA could then celebrate and applaud those efforts. The proposal starts with something as simple as offering internships to re-entering lawyers; it ends with something as complex as creating workplaces that value diversity of experience.

### **2. USING EXPERIENCE TO SET A RESEARCH AGENDA**

The WBA's ninety year history of fighting for the inclusion of women in the legal profession, and the personal experiences of all of its members, give it a tremendous well of experience. The WBA has unique expertise that it should use to frame a complete and strategic research agenda for the collection of the empirical research needed to advance the dialogue regarding the place of women in the profession. The WBA is in a unique position to help researchers discern the right questions and then answer them.

For example, the WBA is well positioned to ask *why* certain existing policies or systems, such as part-time policies implemented by well-meaning employers, are not achieving the necessary results. The large membership of the WBA is a huge untapped source of knowledge about the lived realities of women attorneys, but researchers must pull all of that information together to help make sense of systemic problems. Despite a number of excellent studies, many outstanding research questions remain on issues such as the gendered impacts of billable hour structures, the practical functionality of part-time jobs, the role of unpredictable work hours in job satisfaction, the impact of micro-level interactions among personnel, the perceived value of specific kinds of labor, the particular ways in which women of color, lesbians and women with disabilities are largely marginalized in complex ways, whether men and women approach their tasks differently in a way that disadvantages women, and, whether women still lag behind in management and business development, and if they do, what the implications of this lag might be. The WBA can play a critical role in re-igniting the dialogue by communicating with the academic community about what the stumbling blocks to success might be. The WBA may also help researchers locate funding for studies to test those ideas, and place interested social scientists in contact with research subjects or perhaps even commission the work itself.

The WBA can also engage with researchers, such as labor economists, to improve the arguments needed to convince legal employers to change. For example, the legal community has put a lot of stock in the argument that there is a "business case" for the retention and advancement of women and women of color.<sup>176</sup> Law firms are inherently bottom-line driven. If the "business case" for diversity were as persuasive as the rhetoric would sug-

gest, one might assume that the numbers would speak for themselves in client's "voting with their feet." The WBA can marshal resources to examine this argument rigorously.

Of course, being a vocal critic of law firm employment policies and business models, and advocating for change, may create challenges for the WBA as well. Early WBA documents suggest that the WBA was very reluctant to solicit formal sponsorships because they undermined the ability of the organization to take controversial positions on issues.<sup>177</sup> To play the leadership role in changing the current legal culture, the Association must be free to make unconstrained assessments of the field. Law firms support, both socially and financially, the excellent work of the Association, especially with regard to professional and leadership development. So, the WBA, like all professional organizations, must strike a careful balance between finding ways to support the diverse range of programs it offers its membership base, while still positioning itself to leverage its institutional capacity for advocacy.

### 3. DEVELOPING LEADERSHIP CAPACITY

The WBA Archives also reinforce the WBA's unique role in the development of women's leadership capacity. Much like the benefit of *pro bono* legal work, which is often seen as one way for young associates to gain practical experience as well as perform a public service, working in the leadership structure of the WBA should be seen as a public good as well as of personal benefit to the women who develop their talents for networking, development, organization and, of course, multi-tasking. The women's bar remains a critical forum through which active women can rise quickly, while working on an issue about which they are passionate—their own profession. Given the alarming attrition rates among women of color, development of the leadership talents of women from historically discriminated groups is particularly pressing.

One area of leadership capacity-building that the WBA is uniquely positioned to address is the gap—be it perceived or real—in the business development skills of women lawyers. This subject is nearly invisible in law schools, perhaps because law professors generally have little experience or interest in managing law practices. Rainmaking seminars seem to have made only a small dent in the perception that women do not rise in firms because they do not contribute as much as men to the generation of business. The leadership of the WBA is positioned well to question the underlying assumptions regarding the economic value to firms of various kinds of labor, and to present a role model of the business of law to new attorneys.

The development of leadership should extend to law students—and cover the concept of civic leadership and professional responsibility as well. The recent Carnegie Report on Legal Education<sup>178</sup> points out that law schools do an excellent job of training students in the substantive knowledge of law, yet a poor job of training students in what they call the "apprenticeship of professional identity and purpose." The con-

cept goes beyond legal ethics as tested for admission to the bar. The concept instead stretches to what the identity of a lawyer—a professional—entails in the sense of personal, community and civic responsibility. The WBA and similar organizations can step into this breach by working directly with students, modeling for them what it means to engage in a self-reflexive law practice that includes not only their billable work, but also work for the larger community. Even better, it could more actively engage law students concretely in the work of the Association, helping them to learn not only about women in the profession, but also to absorb the business development, organizational and social skills a great lawyer needs.

### B. ACADEMIA PLAYS A ROLE IN SUPPORTING WOMEN IN THE PROFESSION

With women making up half of all law school graduates, the Archives also reinforce the ongoing role of women's legal studies. Legal education in most U.S. law schools looks remarkably like it did in Mussey and Gillett's day. While many law schools offer limited courses in sex-based discrimination, the needs and concerns of women remain largely invisible or unexplored in mainstream law school classes.<sup>179</sup> Notably, the young lawyers who exit law firms were also recently students, and it is likely that law schools have a part to play in the advancement of women in the profession. In all of these areas, there is still a strong role for WCL and similar academic institutions.

Legal academics have a role in changing the nature of law itself—in this case making sure it is not used as a tool to perpetuate gender inequality, questioning its foundations to ensure that they do not rest on outmoded stereotypes, and ensuring that it meets the needs of today's women. But, changing the culture of legal academia to open law up to this kind of inquiry is difficult and complex. While scholars have written on these topics extensively for the past forty-five years, and there has been improvement in many case books, there are some aspects of the law school curriculum (such as the basic content of the first year of law school, or the use of the Socratic method) that appear to have changed little in response. Academics with institutional support have a better chance at changing curricula, publishing research, and changing law school pedagogy to better account for the needs and experiences of women. There is still much room for improvement, even in schools such as WCL, who have made enormous efforts to integrate gender across the curriculum.

Law schools shape the expectations and experiences of young lawyers. Mussey took a long-term interest in the careers of her "girls,"<sup>180</sup> and law schools today must do the same. Today, law schools' interest must extend to understanding the reasons why their women alumni are leaving the private practice of law. Many lawyers, particularly female lawyers, report that they leave law firms because they simply cannot make law firm life square with the rest of their life.<sup>181</sup> Law schools can play a role in teaching their students how to identify the firms, jobs, and

fields that will lead to a satisfying life as well as a career in law. Students who can discern what law firms put genuine resources into promoting and retaining women, and women of color in particular, will probably fare better in finding wonderful opportunities for a satisfying career that do exist in practice.

## CONCLUSION

Mussey and Gillett founded these two organizations – one to train lawyers, one to support them in their practice. But their work is not nearly complete. The archives tell us that our “mothers-in-law” succeeded in opening doors to every legal sector for women, obtaining the vote, securing fair pay legisla-

tion, and training generations of women lawyers. Ninety years later, we can be certain that Mussey and Gillett would be proud of the partnership that continues between these two institutions. For this project, we have gone back to the proverbial well, looking into the legacy of Mussey, Gillett, and the women they worked and struggled with for inspiration and ideas. We hope that with the availability of these Archives, others will do the same and wind up the unfinished business of Mussey and Gillett.

## ENDNOTES

\* Jamie R. Abrams is a Legal Rhetoric Instructor at the Washington College of Law, an active member of the Women’s Bar Association of the District of Columbia, and an alumna of the Washington College of Law. Daniela Kraiem is the Associate Director of the Women and the Law Program and a Practitioner-in-Residence at the Washington College of Law, where she teaches “Gender Perspectives Across the World.” The authors would like to thank their research assistants, Judith Pichler, Erica Lounsberry, Caleb Medearis, and Maria Manon for their invaluable contributions to this article. They would also like to thank Associate Dean Billie Jo Kaufmann and the faculty and staff of the Pence Law Library for their generous assistance with the archival materials. The authors also appreciated John Dale’s helpful comments and review of an early draft. Mary Francis and Darryle Brown provided very helpful editing and document support.

<sup>1</sup> Burnita Shelton Matthews, *Why an Association of Women Lawyers*, 21 WOMEN LAWYERS’ J. 32 (1935).

<sup>2</sup> See, e.g., Minutes from Meeting of WBA of D.C. 2 (May 2, 1950) (recognizing Ms. Mussey’s 100th birthday with a ceremony at her grave in Oak Hill Cemetery).

<sup>3</sup> Washington College of Law [hereinafter WCL], where used, also refers to Women’s Law Class, the former name of the institution founded by Ellen Spencer Mussey and Emma Gillett.

<sup>4</sup> See, e.g., Minutes from Meeting of WBA of D.C. 2 (Feb. 16, 1932).

<sup>5</sup> WBA OF D.C., CREATING PATHWAYS TO SUCCESS 6 (2006).

<sup>6</sup> In our work, we have focused considerably more on the materials from the WBA, as the history of WCL has been excellently chronicled by others, most notably Mary L. Clark. See Mary L. Clark, *The Founding of the Washington College of Law: The First Law School Established by Women for Women*, 47 AM. U. L. REV. 613, 672 (1998); VIRGINIA G. DRACHMAN, SISTERS IN LAW: WOMEN LAWYERS IN MODERN AMERICAN HISTORY, 148-156 (Harv. Univ. Press 1998) [hereinafter SISTERS IN LAW].

<sup>7</sup> DRACHMAN, SISTERS IN LAW, *supra* note 6, at 39.

<sup>8</sup> *Id.* at 152.

<sup>9</sup> *Id.* at 40.

<sup>10</sup> Minutes from WBA Meeting 1 (Feb. 15, 1927) (on file with the WBA Archives at Washington College of Law’s Pence Law Library) [hereinafter WBA Archives]; see also, GRACE HATHAWAY, FATE RIDES A TORTOISE A BIOGRAPHY OF ELLEN SPENCER MUSSEY 198 (The John C. Winston Co. 1937) (describing Mrs. Mussey’s involvement in getting a bill allowing women to serve on juries in D.C. passed in 1927).

<sup>11</sup> U.S. CONST. amend. XIX (allowing women the right to vote in 1921).

<sup>12</sup> HATHAWAY, *supra* note 10, at 99 (noting that bill granting women right to hold property in own name after marriage in D.C. signed into law in 1896).

<sup>13</sup> *Id.* at 199 (noting that Mussey still practiced law when she was seventy-seven years old).

<sup>14</sup> VIRGINIA G. DRACHMAN, WOMEN LAWYERS AND THE ORIGINS OF PROFESSIONAL IDENTITY IN AMERICA: THE LETTERS OF THE EQUITY CLUB, 1887-1890 223 (Univ. of Michigan Press, 1993) [hereinafter WOMEN LAWYERS].

<sup>15</sup> Minutes from First Meeting to Effect a Bar Ass’n for Women (May 19, 1917) (on file with the WBA Archives). For more information on Belva Lockwood’s

fight to gain admittance to the Supreme Court Bar, see DRACHMAN, SISTERS IN LAW, *supra* note 6, at 26-27 (describing the Act of Congress required to force the United States Supreme Court to admit a woman to practice in front of it).

<sup>16</sup> DRACHMAN, WOMEN LAWYERS, *supra* note 14, at 223.

<sup>17</sup> Letter from Emma Gillett to Equity Club (Apr. 27, 1889), reprinted in DRACHMAN, WOMEN LAWYERS, *supra* note 14, at 159-62 (explaining the nature of her work, characterized as “very little court work”).

<sup>18</sup> See, e.g., *History of WCL: Dean Ellen Spencer Mussey*, WASHINGTON COLLEGE OF LAW, <http://www.wcl.american.edu/history/deanmussey.cfm> (last visited Oct. 15, 2008) (noting that Alumni Association raised funds for scholarships as early as 1903); Minutes from the Fall Meeting of the WBA of D.C. 1 (Oct. 21, 1924).

<sup>19</sup> See WCL Catalog 1 (1904-1905); see also, DRACHMAN, SISTERS IN LAW, *supra* note 6, at 153.

<sup>20</sup> HATHAWAY, *supra* note 10, at 130.

<sup>21</sup> DRACHMAN, SISTERS IN LAW, *supra* note 6, at 152.

<sup>22</sup> Clark, *supra* note 6, at 672.

<sup>23</sup> HATHAWAY, *supra* note 10, at 188 (noting that student Helen Jamison wrote a text on common law pleading, and surmising that this may have been the first legal textbook written by a woman, and that Nanette Paul wrote text on parliamentary law).

<sup>24</sup> *Id.* at 185-194 (describing the careers of some WCL students, including Katherine Sellers, the first woman to be appointed to the bench under federal authority).

<sup>25</sup> *Id.* at 129.

<sup>26</sup> *Emma Melinda Gillett (Obituary)*, 15.2 WOMEN LAWYERS’ J. 3 (1927).

<sup>27</sup> Clark, *supra* note 6, at 656.

<sup>28</sup> See *id.* Clark’s article gives an excellent and thorough account of this issue.

<sup>29</sup> HATHAWAY, *supra* note 10, at 6.

<sup>30</sup> See, e.g., WCL Catalog 7 (1899-1900).

<sup>31</sup> Clark, *supra* note 6, at 656.

<sup>32</sup> DRACHMAN, SISTERS IN LAW, *supra* note 6, at 174.

<sup>33</sup> *Rule in Force for Years Due to be Broken in January*, WASH. POST, at M8 (Dec. 20, 1931) (noting that D.C. Bar association to take first women members starting in January 1932).

<sup>34</sup> Letter from the WCL Alumni Ass’n (1917) (on file with the WBA Archives).

<sup>35</sup> Minutes from First Meeting to Effect a Bar Association for Women (May 19, 1917) (on file with the WBA Archives).

<sup>36</sup> Minutes from Meeting of WBA of D.C. 2 (Oct. 9, 1917) (on file with the WBA Archives).

<sup>37</sup> CONST. WOMEN’S BAR ASS’N OF D.C. art. II.

<sup>38</sup> Ellen Spencer Mussey, President, WBA of D.C., First Annual Address of President 1-2 (May 14, 1918) (on file with the WBA Archives).

<sup>39</sup> *Id.* at 2.

<sup>40</sup> Ida May Moyers, President, WBA of D.C., Annual Report of the President 1 (May 11, 1920) (on file with the WBA Archives).

<sup>41</sup> Beatrice A. Clephane, President, WBA of D.C., Report of the President 2 (1936) (on file with the WBA Archives).

- <sup>42</sup> Nadine Lane Gallagher, President, WBA of D.C., Report of the President 1 (1943-1944).
- <sup>43</sup> Minutes from Meeting of WBA of D.C. 1 (May 17, 1949) (on file with the WBA Archives).
- <sup>44</sup> See Jo Garrison, *Patricia Frohman Receives Young Lawyer of the Year Award*, NEWS & VIEWS WBA OF D.C. 1 (Aug. 1966).
- <sup>45</sup> Letter from Joan Countryman & Kathleen A. Bauer to Thomas Leary 1 (Mar. 17, 1983) (on file with the WBA Archives).
- <sup>46</sup> Jennifer Maree, WBA President, *The Women's Bar Association: Raising the Bar for 91 Years!*, <http://www.wbadc.org/index.cfm> (last visited Oct. 15, 2008).
- <sup>47</sup> See, e.g., Letter from M.A. Easby-Smith (Oct. 5, 1920) (announcing the Fall meeting of the WBA) (on file with the WBA Archives).
- <sup>48</sup> See, e.g., Minutes from Mid-Winter Meeting of WBA of D.C. 2 (Jan. 11, 1920) (on file with the WBA Archives).
- <sup>49</sup> *Id.*
- <sup>50</sup> Minutes from Meeting of WBA of D.C. 2 (Oct. 9, 1917) (on file with the WBA Archives) (recording election of Mussey); Minutes from Meeting of WBA of D.C. 2 (May 10, 1921) (on file with the WBA Archives) (recording election of Gillett).
- <sup>51</sup> *History of WCL: Deans Past & Present*, WASHINGTON COLLEGE OF LAW, <http://www.wcl.american.edu/history/deans.cfm> (last visited October 15, 2008). Mussey served as Dean from 1898-1914. Gillett served as Dean from 1914-1925.
- <sup>52</sup> *Id.*
- <sup>53</sup> HATHAWAY, *supra* note 10, at 89.
- <sup>54</sup> *Id.* at 98-99.
- <sup>55</sup> DRACHMAN, SISTERS IN LAW, *supra* note 6, at 70.
- <sup>56</sup> HATHAWAY, *supra* note 10, at 155.
- <sup>57</sup> *Id.* at 156.
- <sup>58</sup> Mussey, *supra* note 38, at 1.
- <sup>59</sup> HATHAWAY, *supra* note 10, at 166.
- <sup>60</sup> See, e.g., Minutes from the Special meeting of the WBA of D.C., December 14, 1925, 1 MINUTES OF THE WOMEN'S BAR ASS'N 145; Minutes from the meeting of the WBA of D.C., Feb. 17, 1931, 1 MINUTES OF THE WOMEN'S BAR ASS'N 215; Minutes from the meeting of the WBA of D.C., May 19, 1931, 1 MINUTES OF THE WOMEN'S BAR ASS'N 222 (noting the passage of the bill to extend the right to recover nationality to women passed Congress and signed into law).
- <sup>61</sup> Minutes from the Special Meeting of the WBA of D.C. 1-2 (Dec. 14, 1925) (on file with the WBA Archives).
- <sup>62</sup> *Id.*
- <sup>63</sup> Letter from Ida May Moyers to the Membership of the WBA of D.C. 2 (Apr. 20, 1921) (announcing the Fall meeting of the WBA) (on file with the WBA Archives).
- <sup>64</sup> *Id.*
- <sup>65</sup> See *id.* at 3.
- <sup>66</sup> Verta Taylor, *Social Movement Continuity: The Women's Movement in Abeyance*, 54 AM. SOC. REV. 761, 763 (1989).
- <sup>67</sup> Clark, *supra* note 6, at 668 (citing Henna Hill Kay, *The Future of Women Law Professors*, 77 IOWA L. REV. 5 (1991)).
- <sup>68</sup> See *id.* at 615.
- <sup>69</sup> Taylor, *supra* note 66, at 761 (suggesting that National Women's Party served to bridge first and second waves of women's movement).
- <sup>70</sup> Minutes from the meeting of the WBA of D.C. (Nov. 13, 1935) (approving adoption of regulations for government of Junior Bar Section).
- <sup>71</sup> Taylor, *supra* note 66, at 765 (reporting that most members of National Women's Party in 1950 were fifty years or older).
- <sup>72</sup> Minutes from Special meeting of WBA of D.C. (Dec. 14, 1925) (on file with the WBA Archives).
- <sup>73</sup> *Id.*
- <sup>74</sup> Minutes from Meeting of WBA of D.C. (May 19, 1931) (on file with the WBA Archives).
- <sup>75</sup> REPORT OF THE COMMITTEE OF THE WOMEN'S BAR ASSOCIATION OF THE DISTRICT OF COLUMBIA TO STUDY THE DOCUMENTS RELATED TO THE PERMANENT COURT OF INTERNATIONAL JUSTICE (Government Printing Office 1933).
- <sup>76</sup> See, e.g., Minutes from Meeting of WBA of D.C. Board of Directors and Committee Chairmen 3 (Jan. 24, 1949) (expressing concern regarding continued discrimination against women in public employment.) (on file with the WBA Archives).
- <sup>77</sup> Taylor, *supra* note 66, at 765 (describing attacks on feminists made in *Modern Women*, FERDINAND LUNDBERG AND MARYNIA F. FARNHAM, MODERN WOMEN: THE LOST SEX (Harper & Brothers 1947)).
- <sup>78</sup> WBA Annual Dinner Speech (Feb. 5, 1946) (on file with the WBA Archives).
- <sup>79</sup> WBA of D.C. Report of September Meeting 1 (Oct. 7, 1957) (on file with the WBA Archives).
- <sup>80</sup> Minutes from Meeting of WBA of D.C. 2 (Sept. 28, 1965) (on file with the WBA Archives).
- <sup>81</sup> *Legislation Supported by WBA Enacted Into Law*, NEWS & VIEWS WBA OF D.C. 2 (Nov. 1965) (on file with the WBA Archives).
- <sup>82</sup> See, e.g., Minutes from Meeting of Board of Directors of WBA of D.C. 2 (Nov. 29, 1948) (on file with the WBA Archives); Minutes from Meeting of WBA of D.C. 3 (Mar. 15, 1949) (on file with the WBA Archives); WBA Committee Functions and Committee Assignments for Year 1960-1961, 4 (on file with the WBA Archives).
- <sup>83</sup> Felicitously, Judge Joyce Hens (Green) is the featured speaker at the WBA/WCL dinner to celebrate the creation of the archives project.
- <sup>84</sup> Letter from Ruth Joyce Hens to Miss O.M. Miracle (Oct. 24, 1960) (on file with the WBA Archives).
- <sup>85</sup> *Id.* at 1-2.
- <sup>86</sup> Establishing A Committee and A Council Relating to The Status of Women, 28 Fed. Reg. 11717 (Nov. 2, 1963).
- <sup>87</sup> WBA of D.C. October Meeting Notice (Oct. 14, 1965) (on file with the WBA Archives).
- <sup>88</sup> See, e.g., Letter from Elizabeth Guhring, President, WBA of D.C. to Louise O'Neill (1966) (on file with the WBA Archives).
- <sup>89</sup> WBA of D.C., *Our History*, <http://www.wbadc.org/displaycommon.cfm?an=2> (last visited Oct. 6, 2008) (listing relevant events in WBA history, including its work with the judiciary and legislative branches of the federal and D.C. government).
- <sup>90</sup> Brief for Women & Families et al., as Amici Curiae Supporting Petitioner, *Ledbetter v. Goodyear Tire & Rubber Co., Inc.*, 421 F.3d 1169 (2007) (No. 05-1074) (emphasizing the petitioner's right for equal pay for each day of equal work).
- <sup>91</sup> Minutes from Meeting of WBA of D.C. 2 (May 17, 1932) (on file with the WBA Archives).
- <sup>92</sup> Letter from Grace Kanode Vickers to Beatrice A. Clephane 2 (May 19, 1936) (on file with the WBA Archives).
- <sup>93</sup> *Id.*
- <sup>94</sup> Minutes from Meeting of WBA of D.C. 3 (Oct. 9, 1917) (on file with the WBA Archives).
- <sup>95</sup> Report, Meeting of American Bar Association 2 (1919) (denoting the social goals of the American Bar Association).
- <sup>96</sup> Letter from Evelyn L. Krupp to Honorable Harry S. Truman (Nov. 3, 1945) (on file with the WBA Archives).
- <sup>97</sup> Minutes of Meeting of the WBA of D.C. 1 (Oct. 17, 1933) (on file with the WBA Archives).
- <sup>98</sup> See, e.g., Minutes of Meeting of WBA of D.C. 2 (Jan. 19, 1926); Minutes of Meeting of WBA of D.C. 2 (May 18, 1926) (on file with the WBA Archives); Minutes of Meeting of WBA of D.C. 2 (Feb. 19, 1929) (on file with the WBA Archives).
- <sup>99</sup> Ida May Moyers, President, WBA of D.C., Annual Report of the President 1 (May 11, 1920) (on file with the WBA Archives).
- <sup>100</sup> See, e.g., Minutes of Meeting of WBA of D.C. 2 (Oct. 10, 1922) (on file with the WBA Archives); Resolution of WBA (Oct. 10, 1922) (on file with the WBA Archives); Minutes of Regular Fall Meeting of WBA of D.C. 1 (Oct. 16, 1923) (on file with the WBA Archives); Minutes of Special Meeting of WBA of D.C. (Jan. 31, 1928) (on file with the WBA Archives).
- <sup>101</sup> Letter from Lenore G. Ehrig (1966) (on file with the WBA Archives); see, e.g., Minutes of Special Meeting of the WBA of D.C. (Oct. 24, 1930) (approving the endorsement of member Rebekah Greathouse for a position as U.S. Assistant Attorney General); Minutes of Meeting of the WBA of D.C. 2 (Feb. 17, 1931) (reporting on the letter addressed to the President of the United States and the Attorney General, which endorsed WBA member, Rebecca Greathouse, for a position as U.S. Assistant Attorney General). Mrs. Greathouse was later appointed. *Women Regard Lawyer Debate with Tolerance*, WASH. POST, Mar. 28, 1934, at 15 (noting that Mrs. Greathouse was a former Assistant Attorney General).
- <sup>102</sup> See, e.g., Letter from Ruth Joyce Hens to President-Elect John F. Kennedy (Jan. 16, 1961) (on file with the WBA Archives); Deans: Past & Present, *supra* note 51; Letter from Evelyn L. Krupp to Honorable Harry S. Truman (Nov. 3, 1945) (on file with the WBA Archives); Minutes of Special Meeting of WBA of D.C. (Jan. 25, 1934) (on file with the WBA Archives).
- <sup>103</sup> See Minutes Meeting of Board of Directors of WBA of D.C. 1-2 (June 27, 1962) (on file with the WBA Archives) (reporting that the WBA had written letters to the President and Attorney General endorsing a WBA member for appointment to a judicial vacancy).



## ENDNOTES CONTINUED

- <sup>104</sup> Minutes of Meeting of WBA of D.C. 2 (Oct. 20, 1925) (on file with the WBA Archives).
- <sup>105</sup> See, e.g., *Women Won't Work For Him If District Attorney Knows It*, WASH. POST, at 13 (Mar. 24, 1934) (reporting that District Attorney, Mr. Garrett, was unwilling to have women as assistants in his office); Ida May Moyers, President, WBA of D.C., Annual Report of the President 1 (May 11, 1920) (on file with the WBA Archives).
- <sup>106</sup> *Id.*
- <sup>107</sup> Minutes of the Special Meeting of the WBA of D.C. 1 (Mar. 18, 1930) (on file with the WBA Archives).
- <sup>108</sup> See Minutes of Meeting of WBA of D.C. 2 (Oct. 21, 1930) (on file with the WBA Archives) (authorizing the Executive Committee to recommend the appointment of a WBA member, as long as two candidates are not interested in a single position); Minutes of Meeting of WBA of D.C. 2-4 (Feb. 17, 1931) (on file with the WBA Archives).
- <sup>109</sup> Minutes of Meeting of YWCA of WBA of D.C. (on file with the WBA Archives).
- <sup>110</sup> Minutes of WBA Meeting 2 (Jan. 25, 1966) (on file with the WBA Archives); Minutes of WBA Meeting of Board of Directors (Nov. 22) (on file with the WBA Archives).
- <sup>111</sup> Minutes of Special Meeting of WBA of D.C. 1 (Mar. 18, 1930) (on file with the WBA Archives).
- <sup>112</sup> See, e.g., Sara Mero Williams, President, WBA of D.C., Report of the President 1945-1946, 2 (on file with the WBA Archives).
- <sup>113</sup> See, e.g., Memorandum from WBA regarding Committee Appointments for the year 1957-1958; *accord*. Notes of Special Meeting of WBA dated Dec. 1, 1917, at 4 (establishing a committee on grievances, auditing, incorporation, and volunteer work); WBA of D.C., *Our History*, <http://www.wbadc.org/displaycommon.cfm?an=2> (last visited Oct. 6, 2008).
- <sup>114</sup> See, e.g., Minutes of Meeting of WBA of D.C. 2 (Jan. 13, 1920) (on file with the WBA Archives).
- <sup>115</sup> See, e.g., Annual Report of Publicity Committees (May 1936) (on file with the WBA Archives); History of the Affiliation of the WBA with the National Association of Women's Lawyers 1 (on file with the WBA Archives); Report on the National Association of Women Lawyers (on file with the WBA Archives).
- <sup>116</sup> See Business and Professional Women/USA, <http://www.bpwusa.org/i4a/pages/index.cfm?pageid=3678> (last visited Oct. 12, 2008) (including information on the history, membership, and current events of the Business and Professional Women Association). Rewalt was on the Business and Professional Women Board of Directors.
- <sup>117</sup> *Individual Portraits Contained in the Records of the National Woman's Party, in NATIONAL WOMAN'S PARTY: A REGISTER OF ITS RECORDS IN THE LIBRARY OF CONGRESS*, (Groups I and II) 57-58, 66 (2005), [http://memory.loc.gov/ammem/collections/suffrage/nwp/portrait\\_list.pdf](http://memory.loc.gov/ammem/collections/suffrage/nwp/portrait_list.pdf).
- <sup>118</sup> CONST. WOMEN'S BAR ASS'N OF D.C.; Letter from Helen V. Dolan to Edith G. Grown (Feb. 13, 1967) (on file with the WBA Archives).
- <sup>119</sup> See, e.g., Temporary CONST. WOMEN'S BAR ASS'N OF D.C. (1917) (on file with the WBA Archives).
- <sup>120</sup> See WBA of D.C. Home Page, <http://www.wbadc.org/> (last visited Sept. 1, 2008).
- <sup>121</sup> Martha K. Pearce to Equity Club, 1887, Ann Arbor, Equity Club Letters, Dillon Collection, *reprinted in Women Lawyers*, *supra* note 14, at 62.
- <sup>122</sup> Martha K. Pearce to Equity Club, 1887, Ann Arbor, Equity Club Letters, Dillon Collection, *reprinted in* DRACHMAN, WOMEN LAWYERS, *supra* note 15, at 62-63.
- <sup>123</sup> See *id.* at 1-38 (discussing letters written by early female lawyers).
- <sup>124</sup> See, e.g., Minutes of Meeting of WBA of D.C. 1 (May 18, 1926); Minutes of Special Meeting of Exec. Comm. of WBA of D.C. (Nov. 7, 1930) (on file with the WBA Archives).
- <sup>125</sup> HATHAWAY, *supra* note 10, at 107 (noting that Gillett's law partner W. J. Newton, Associate Justice the Court of Appeals Seth Shepard, and Dean of Catholic University William Robinson, taught law classes in 1897).
- <sup>126</sup> Clark, *supra* note 6, at 676.
- <sup>127</sup> CYNTHIA FUCHS-EPSTEIN, WOMEN IN LAW 260 (Basic Books 1981) (listing five non-WCL female law school deans up through 1981).
- <sup>128</sup> Interview conducted by Amerlia Fry, Suffragists Oral History Project, Burnita Shelton Mathews: Pathfinder in the Legal Aspects of Women (1973), *available at* <http://www.calisphere.universityofcalifornia.edu> (last visited on Sept. 10, 2008).
- <sup>129</sup> CYNTHIA FUCHS-EPSTEIN, *supra* note 127, at 227.
- <sup>130</sup> *Id.* at 233.
- <sup>131</sup> Table Showing Analysis of Expenditures of the Women's Bar Association.
- <sup>132</sup> See, e.g., *Annual Dinner of Bar Group Next Saturday*, WASH. POST, Jan. 14, 1934, at S2; *Women of Bar Dine Saturday: Three Talks Slated*, WASH. POST, Mar. 23, 1936, at 17; see Minutes of Meeting of WBA of D.C. 1 (May 18, 1926); see also Minutes of Special Meeting of Exec. Comm. of WBA of D.C. (Nov. 7, 1930) (on file with the WBA Archives).
- <sup>133</sup> See Letter from Laura M. Berrien to Members of the WBA of D.C. (Nov. 15, 1917) (on file with the WBA Archives).
- <sup>134</sup> Curoe, *Report of Chairman of Program Committee of the WBA of D.C. at 2* (undated) (on file with the WBA Archives).
- <sup>135</sup> WBA of D.C. *Calendar of Events*, <http://www.wbaD.C.org/cde.cfm?event=205979> (May 15, 2008).
- <sup>136</sup> Legal Bisnow, Last Night's Ginsburg Honors, *available at* [http://www.bisnow.com/washington\\_D.C.\\_commercial\\_real\\_estate\\_news\\_story.php?p=1130](http://www.bisnow.com/washington_D.C._commercial_real_estate_news_story.php?p=1130).
- <sup>137</sup> WBA Showcase Programs, <http://www.wbaD.C.org/displaycommon.cfm?an=6> (last visited Sept. 1, 2008).
- <sup>138</sup> Minutes of Meeting of WBA of D.C. 2 (Nov. 28, 1961) (on file with the WBA Archives).
- <sup>139</sup> *Id.*
- <sup>140</sup> WBA of D.C. Program 1 (on file with the WBA Archives) (recording a reception for women lawyers and the wives of ABA officials in 1960).
- <sup>141</sup> Minutes of Special Meeting of Exec. Comm. of the WBA of D.C. 2 (Oct. 16, 1931) (on file with the WBA Archives).
- <sup>142</sup> See *Women Lawyers*, *supra* note 14, at 227.
- <sup>143</sup> See William F. Yost, III, *Women and Bar Leadership*, 44 ADVOCATE 4, 4 (2001).
- <sup>144</sup> CYNTHIA FUCHS-EPSTEIN, *supra* note 127, at 260.
- <sup>145</sup> *Id.*
- <sup>146</sup> *Id.*
- <sup>147</sup> *Id.*
- <sup>148</sup> Moyers McElroy and Edwina Austin Avery, *The WBA of D.C.*, 21 WOMEN L. J. 21-26 (1935).
- <sup>149</sup> *Id.* at 46.
- <sup>150</sup> *Id.*
- <sup>151</sup> See, e.g., Minutes of Special Meeting of Exec. Comm. of the WBA of D.C. 1 (Oct. 16, 1931) (on file with the WBA Archives).
- <sup>152</sup> Annabel Matthews, President, WBA of D.C., Report of President: 1938-1939, 1.
- <sup>153</sup> See Minutes of Regular Meeting of WBA of D.C. 1-2 (Jan. 15, 1941) (on file with the WBA Archives).
- <sup>154</sup> Report of the President 1945-1946.
- <sup>155</sup> Williams, President, *supra* note 112, at 2.
- <sup>156</sup> Report of September Meeting WBA of D.C. (1957-1958) (on file with the WBA Archives).
- <sup>157</sup> Williams, *supra* note 112, at 1.
- <sup>158</sup> Emma Melinda Gillett (Obituary), 15 WOMEN L. J. 2 (Apr. 1927).
- <sup>159</sup> A few additional areas for research might be the fascinating lives of some members, such as Rebekah Greathouse, WCL alum and active WBA member, who was the first woman District Attorney in Washington, DC and a force in Alice Paul's National Women's Party. Other figures that merit sustained exploration include the first female District Court Judge Burnita Shelton Mathews, who taught at WCL and was active in the WBA for years, and Marguerite Rawalt, who was extraordinarily active in both the WBA and the Women's Business and Professional Association.
- <sup>160</sup> Originally known as the Program on Gender, Work & Family.
- <sup>161</sup> See Creating Pathways to Success, Initiative on Advancement and Retention of Women, *available at* <http://www.wbadc.org> (WBA 2006) [hereinafter Pathways to Success].
- <sup>162</sup> National Association of Women Lawyers, National Survey on Retention and Promotion of Women in Law Firms 4-5 (2007) (stating that women comprise 49% of the entry-level classes of a sampling of large law firms, 47% of mid-level associates, 43% of 7th-year associates, 30% of of-counsels, 26% of non-equity partners, and 16% of equity partners).
- <sup>163</sup> *Id.* at 3.
- <sup>164</sup> *Id.* at 7.
- <sup>165</sup> *Id.* at 8-9.
- <sup>166</sup> American Bar Association, Comm. on Women in the Profession, *Visible Invisibility* at 10 (2006).
- <sup>167</sup> *Id.*
- <sup>168</sup> *Id.*
- <sup>169</sup> *Id.*
- <sup>170</sup> ABA Comm. on Women in the Profession, *A Current Glance at Women in the Law* (2006), *available at* <http://www.abanet.org/women/reports.html> (last

visited Aug. 31, 2008).

<sup>171</sup> *Id.*

<sup>172</sup> See Clark, *supra* note 6, at 672 (citing Grace Hathaway's biography of Mussey, Fate Rides a Tortoise, but noting that Hathaway book is largely a tribute).

<sup>173</sup> Ellen Spencer Mussey, President, WBA of D.C., First Annual Address of President 1 (May 14, 1918) (on file with the WBA Archives).

<sup>174</sup> See, e.g., FlexTime Lawyers and Working Mother Best Law Firms Initiative, available at <http://www.flextimelawyers.com/best.asp> (listing fifty best national law firms for women as measured by family-friendly employment policies and advancement and retention of women).

<sup>175</sup> American University Washington College of Law Lawyer Re-Entry Program, <http://www.wcl.american.edu/reentry/> (last visited Oct. 7, 2008).

<sup>176</sup> See Pathways to Success, *supra* note 161.

<sup>177</sup> See Minutes of Regular Meeting of WBA of D.C. 3 (Sept. 16, 1947) (on file with the WBA Archives) (dismissing the idea of including advertisements in the

annual dinner materials because it "was not consonant with the dignity of the organization").

<sup>178</sup> Educating Lawyers Preparation for the Profession of Law, [http://www.carnegiefoundation.org/dynamic/publications/elibrary\\_pdf\\_632.pdf](http://www.carnegiefoundation.org/dynamic/publications/elibrary_pdf_632.pdf) (last visited Sept. 14, 2008).

<sup>179</sup> Lucinda Finely, *A Break in the Silence: Including Women's Issues in a Torts Course*, 1 YALE J.L. & FEMINISM 41 (1989).

<sup>180</sup> HATHAWAY, *supra* note 10, at 185-94.

<sup>181</sup> Joan Williams et al., *Opt Out or Pushed Out?: How the Press Covers Work/Family Conflict, The Untold Story of Why Women Leave the Workforce* 29 (2006), available at <http://www.worklifelaw.org/> (last visited Oct. 7, 2008).



(from left to right) The Honorable Judge Joyce Hens Green (United States, District Court of the District of Columbia), Diana Savit (President, Women's Bar Association Foundation), Claudio Grossman (Dean of American University— Washington College of Law)

# SPOTLIGHT: FINDING UNITY IN DIVERSITY

MAYDA COLON TSAKNIS, THE HONORABLE JEANNIE J. HONG, AND JENNIFER MAREE

By  
Sabrina Khan

While the women I interviewed have distinct racial and ethnic backgrounds, unique legal careers, and a wide array of perspectives, each is an inspirational trailblazer who overcame multiple obstacles in order to achieve success. The women shared with me their distinguished histories and revealed how differences in gender and culture impact one's legal experiences. As a current law student, I was impressed by their passion for the law and their remarkable contributions to the legal field. As a female minority law student, I was able to identify with their battles and left each interview with a new appreciation for my own history, gender and ethnicity.

As a young Hispanic attorney, Mayda Colón Tsaknis noticed a significant need to deal with legal issues unique to the Hispanic community, and so founded the Maryland Hispanic Bar Association in 1993. She quickly became its first president. Colón Tsaknis was born and raised in Puerto Rico and attended St. Mary's University School of Law in Texas. Soon after graduation, she joined the US Equal Employment Opportunity Commission's first trial team. She then became General Counsel for the Puerto Rican Federal Affairs Administration ("PRFAA"). Colón Tsaknis now practices in Rockville, Maryland, at the fully bilingual women's law firm she created in 1992.

When The Honorable Jeannie J. Hong was sworn in on August 14, 2002 to the District Court of Maryland in Baltimore, she became the first female Asian American judge in Maryland. She was born in Seoul, South Korea and immigrated to the United States at age 2. After growing up in Centreville, Virginia, she graduated from American University, Washington College of Law in 1992. Hong spent eight vibrant years as an Assistant State's Attorney for the Baltimore City State's Attorney's Office in the Juvenile Division before taking her seat on the bench.

Jennifer Maree, an Associate Attorney at Patton Boggs LLP, is the current President of the Women's Bar Association of the District of Columbia, which is now celebrating its 91<sup>st</sup> anniversary. After having spent her childhood moving throughout the Western United States, she received her Juris Doctorate from American University, Washington College of Law in 2001. Before joining Patton Boggs, Maree was an Honors Attorney at the Federal Deposit Insurance Corporation.

## MAYDA COLON TSAKNIS

**When did you decide that you wanted to pursue a career in law, and what were some of the motivational forces behind that decision?**

My family raised my three siblings and me to believe that men and women were identical in terms of professional capability. While I was growing up, it was unusual to see many female lawyers in the states, however that was not the case in Puerto Rico; I was used to seeing female lawyers around. For a long time I envisioned myself becoming an attorney because I be-

lieved that profession really fit my personality. I was determined to go to law school either in my country or elsewhere.

**Could you recall a professional experience when you were particularly self-conscious of or inhibited by your sex and/or race?**

In regards to gender, not so much. But race, yes. The other attorneys on the first trial team of the US Equal Employment Opportunity Commission ("EEOC") consisted of six or seven Caucasians and African Americans. Regardless of the fact that it was racially diverse, I felt like I was treated as an unequal. I also stood out for my accent. To compensate for that, I was always very well-prepared. This made me not feel intimidated even when, for example, I represented the government by myself against corporations who hired ten or so attorneys. I carried the confidence I gained from that experience into my future endeavors.

**You mentioned that your accent influenced how you were received in court. Would you mind elaborating?**

One of my law school professors once told me, "I believe your accent will be an asset with a jury." I have found that to be very true. The fact that it is something different makes people listen more carefully to me. Once, however, a federal judge in D.C. stated, "Speak English. I don't understand you." This was very offensive so I asked, "Your Honor, I would like to please know whether your saying this is going to be prejudicial to my client because you have a bias." He was totally taken aback and apologized, claiming he didn't mean it that way. We have since become very good friends and he hasn't asked me about my accent again!

**Would you please briefly outline the history of Maryland's Hispanic Bar Association (MHBA)--particularly your role in its foundation and as its first president? How did you deal with some of the challenges you faced?**

I went through the Maryland Lawyers' Manual to identify some Hispanic attorneys, wrote letters asking them to be the first members of the MHBA, and explained the need for a Hispanic Bar Association in our state to protect the rights of our people. Our first agenda in 1993 focused on the issue of the interpreters. There had previously been no minimum qualifications for Spanish interpreters in Maryland so courts could not always distinguish which ones were credible. The Washington Post's coverage of the MHBA's initiative to make some minimum qualification requirements generated a lot of publicity and our testimony to Congress helped us eventually achieve our goal of having very good interpreters in court.

There were some non-Hispanics who felt that there shouldn't be a separate bar association for Hispanics because general associations were sufficient. I disagreed and told them that we have certain needs particular to us. A group of people in the larger community greatly benefit from our (the MHBA's) interpretation of legal issues.

**Famous scholars, perhaps most notably Samuel Huntington, have asserted that the Latino/Hispanic population in our country is severely insulated due to linguistic and cultural differences, and therefore, unlike past immigrant populations, will not integrate well into American society. Do you agree or disagree, and why?**

People should not lump all Hispanics together. There are professional Hispanics, and Hispanics who have not had the opportunity to be educated to the same degree. There is a large group of Hispanic immigrants, the first generation, who only got the chance to complete up to fifth or sixth grade levels of education in their mother countries. They deserve a lot of credit because in an effort to provide their children with the best opportunities possible, they have come to a country which primarily uses English, one of the most difficult languages to learn, and often work multiple menial jobs that nobody else wants. They are so busy trying to maintain their families that they have no time or means by which to improve their English. After all every first-generation population is a little isolated, not because they want to be, but because the general population forces them to be isolated. However I think people in the general population are increasingly willing to take the time to not only understand, but even embrace, the Hispanic culture. We are a very warm people who take well to this.

## **THE HONORABLE JEANNIE J. HONG**

**As a first-generation Asian American woman, did you feel pressure from your community and/ or family to pursue certain professions?**

Around the time I was born, there weren't many career opportunities available to women in Korea. Their expected aspirations were mainly to get married. My parents had two daughters for whom they wanted to provide better opportunities so we came to the States. That's why they sometimes acted like the stereotypical Asian parents who pushed their children to become professionals.

**Why did you choose this career path?**

My father always aspired to become a judge and was intrigued with the law so during my first year as an undergraduate student at The University of Virginia, he handed me an LSAT book and said, "Start studying!" I think it was always engineered into me to pursue this career. But after all that I've learned and done, I am very glad that I did.

**As the first Asian-American female judge in Maryland, were you constantly reminded of your racial and cultural background in the courthouse?**

Oh yes, very much. In Maryland I am one of only two Asian American judges, the other being Judge Brian Kim in Montgomery County. When I first got on the bench, I felt like I wasn't just Jeanie Hong, but really Jeanie Hong the representative of my entire group of people. There was a lot of pressure for my actions, demeanor, and the way I dressed not only reflect me, but all Asians in general. That's why especially in the beginning, I really made an assertive effort to be professional, respectful, and dress very nicely because I felt like I was being observed under a microscope. It didn't help that the stereotype that Asians look younger than their age actually applied to me. I

was thirty-six years old when I began this job so when I entered the courthouse my first day, the people at the entrance pointed me in the direction of the law clerks' office! I've been doing this for six and a half years now so I think everyone is used to seeing me around. However I think there are always some hurdles, especially as a young woman trying to gain a reputation for herself, and this is regardless of race.

**Do you think your heritage influences your work? If so, how?**

Even though I have to evaluate everyone equally, I come from a different cultural perspective which helps me understand the dynamics of certain cases well. For example, it's rare but every once in a while I hear a criminal case involving Koreans pooling their money together in what is called *keh*, a practice that has been in our culture for generations. In one situation, somebody cheated everyone else out of the money, so another member of the group assaulted him. Because I understood the culture, I believe I understood what happened in a different way than someone who may not have ever been familiar with that idea beforehand. Also in regards to domestic violence cases, I think I understand why Asian women can often be more reticent to come to court. They often fear losing face for the family.

**You have two children and an intense job as a federal judge in a bustling metropolis with very busy dockets. How do you balance all your obligations, whether they be familial, professional, personal, etc.?**

Prioritizing is key. I could not do this without the support of family. As you embark on your legal career, you'll see that through periods of your life, things will ebb and flow. For example, when women have children, the brunt of child-rearing, overseeing homework, and similar things may make them feel like they cannot participate in as many associations as they'd like. You will always have to balance multiple commitments but like I said, prioritizing them and keeping the ebb and flow idea in mind is important.

## **JENNIFER MAREE**

**You have been an active member of both the American Bar Association (ABA) and the Women's Bar Association (WBA). Besides that the WBA caters specifically to women, how would you distinguish its culture from that of the ABA?**

I appreciated the fact that the ABA promoted networking and career-building experiences. However as a woman, I didn't really feel like my voice was heard as well as it should have been. Sometimes at ABA events, guys would approach me and speak to me in ways that probably weren't the most professional. That's why I joined the WBA. I felt much more comfortable in that setting, like everyone was on an even playing field. We were there to progress causes particular to women in our field about which I felt strongly. It was nice to be treated completely as an equal.

**Today, while the U.S. bans gender discrimination, glass ceilings and other mechanisms used to suppress women remain prevalent throughout many professions, including the law. Have you or any of your female colleagues faced professional challenges due to your gender?**



Absolutely. Of course it's in subtle ways. Even firms and other legal organizations which especially pride themselves on diversity in terms of numbers, that's both racial and gender-wise, have it built into their inner workings.

**How would you advise women to deal with such situations in their legal careers?**

My advice is to be persistent, be patient, and assertive while maintaining a sense of humor about any awkward or frustrating situation into which you're put. It's important to especially remember to be assertive so that we may dispel stereotypes of us being quiet and submissive, and convey to our male colleagues that we notice if we are not being treated as equals.

**True or false: Women have it harder than men in the working world. How about the legal world?**

It's difficult to generalize but I feel that women definitely have it harder than men in the working, including the legal, world. Typically, though not always, women have to balance taking care of children and managing the household activities with work. If your schedule is like mine, which is the average at a large law firm, you spend most of your time at work! This, combined with the fact that women have to work harder to assert ourselves, can sometimes transform work into quite an uphill battle. However it's one definitely worth fighting.

**The term 'feminist' has been both celebrated and stigmatized. Do you consider yourself a feminist? How would you define the term?**

Oh yes, I'd definitely say I'm a feminist and I'm proud to call myself one. Too often women shy away from claiming to

be feminists because they may fear that guys will think they are the types to take issue with every single innocent thing they say and turn their statements into sexist remarks. What I think is the true definition of feminist, however, is simply someone who stands up for the equal rights of women. There's nothing anyone should ever be ashamed of in that. Keep in mind that I've also met quite a few male feminists.

**You graduated from WCL, founded by the same women who played a large part in the creation of the National Women's Bar Association--do you believe this history helps strengthen women's ability to assert themselves in the legal profession?**

WCL, more so than probably many other law schools, offers so many courses, extracurricular activities, and clinical programs which specifically promote women's rights. I'm not saying that just because a female law student doesn't participate in them does not mean she does not do so in her own way outside of school. But I certainly suggest that everyone, not only the female students, check them out. I feel the same way about any other law school experiences, like clubs, which enhance our understanding of diversity issues. I can't emphasize how important it is to always be cognizant of the different perspectives people bring to the table in our everyday and professional discussions.



(from left to right) Teresa Godwin Phelps (Director of Legal Rhetoric, Professor at the Washington College of Law), Jamie Abrams (Professor at the Washington College of Law and author of *Banding Together: Reflections of the Role of the Women's Bar Association of the District of Columbia and the Washington College of Law in Promoting Women's Rights*), and Erica Lounsberry (law student at the Washington College of Law).

# THE UPBRINGING OF A CREATURE: THE SCOPE OF A PARENT'S RIGHT TO TEACH CHILDREN TO HATE

By  
Brooke A. Emery\*

*There is no absurdity so obvious that it cannot be firmly planted in the human head if you only begin to impose it before the age of five, by constantly repeating it with an air of great solemnity.<sup>1</sup>*

## INTRODUCTION: THE BIRTH OF A CREATURE

This paper examines racist<sup>2</sup> speech that is passed down from parent to child and asks whether the State can constitutionally impose regulations<sup>3</sup> on such speech.<sup>4</sup> The regulation of parent-to-child racist speech implicates two distinct constitutional rights: one's right to free speech and a parent's right to control the upbringing of her child.

The United States Constitution contemplates that its citizens be free to "think as [they] will and speak as [they] think."<sup>5</sup> The First Amendment protects this freedom by prohibiting laws that limit or punish speech.<sup>6</sup> Perhaps because of its prominence as the first of all enumerated rights<sup>7</sup> or because of its simple but magnanimous message,<sup>8</sup> the First Amendment has captured the hearts and minds of its citizens:<sup>9</sup> it is romanticized by the avant-garde as a protector of art and intellectual freedom,<sup>10</sup> it reverberates throughout suburban lunchrooms as irreverent rebuttals to schoolhouse teasing,<sup>11</sup> and it is proclaimed a tool for political and social change by the downtrodden and oppressed.<sup>12</sup> There is no doubt that its tenets, secured by our country's founders, have allowed American culture to breathe unorthodox air,<sup>13</sup> a communicative freedom that is often stifled by less expansive speech protections in other countries.<sup>14</sup> Lurking in the shadows, however, is speech's power to harm.<sup>15</sup> Speech, capable of much more than mere offense, can cause psychological<sup>16</sup> and physical<sup>17</sup> harm to its intended targets, as well as message recipients.<sup>18</sup>

There has been much debate over the legitimacy and propriety of regulating racist speech.<sup>19</sup> This debate has typically focused on racist speech made in a public setting that causes harm to the target of the hate speech. Efforts to regulate such speech have largely failed<sup>20</sup> because of the doctrinal prohibition on regulating speech based on the ideology of its message.<sup>21</sup>

This article argues that the unique nature of parent-to-child racist speech allows it to be regulated under the present First Amendment framework, notwithstanding the failed attempts to regulate other racist speech. The article further argues that such speech should be regulated because the core principles that underlie speech protection are not applicable to parent-to-

child racist speech. By focusing on the child as the hearer of hate speech, First Amendment roadblocks that typical hate speech regulations run into may be bypassed. After showing that First Amendment principles such as "marketplace" theory and autonomy theory are unpersuasive when applied to a child, this article will show that the captive audience doctrine allows the State to regulate a parent's decision to raise her child as a racist.

Parent-to-child racist speech also implicates the constitutional right of a parent to raise her child as she sees fit. Although a parent has the right to control the upbringing of her child, she does not have a right to raise her child as a racist. The Supreme Court has long recognized a parent's fundamental right to control the upbringing of her child as a liberty interest protected under the due process clause of the Fourteenth Amendment. The Fourteenth Amendment, in turn, requires that courts show deference to a parent's decisions.<sup>22</sup> Underlying this right is the presumption that most parents act in the best interest of their children. In reality, however, a parent's decision is not always in the best interest of her child.<sup>23</sup> To accommodate this reality, a parent's fundamental right is limited by the rights of the child and the State's interests in protecting children from harm and promoting societal well-being.<sup>24</sup>

When a child's "physical or mental health is jeopardized," the State has the power to abrogate the parent's rights if it is in the best interest of the child.<sup>25</sup> Teaching racism to a child jeopardizes a child's mental and physical health.<sup>26</sup> Once the harm to a child is established, the State can potentially limit a parent's fundamental right. In sum, parent-to-child racist speech can be regulated without violating either a parent's right to free speech or a parent's right to control the upbringing of her child.

Part I begins with a discussion of the legal proceedings through which the State has the opportunity to regulate parent-to-child racist speech. It then discusses how the transmission of racist speech from parent to child harms the child. Part II addresses the substantive due process analysis. This Part discusses the scope of the parental rearing right, and it shows that the State's interest in protecting the welfare of the child and promoting societal well-being may allow the State to interfere when a racist upbringing exists. Part III begins with an examination of a child's speech rights. It moves into an explanation of the underlying justifications for free speech and argues that they are inapposite to parent-to-child racist speech. Finally, it introduces the captive audience exception and shows that parent-to-child racist speech is not protected because a child is essentially "captive" to her parent's racist speech. Part IV concludes with a discussion of the obstacles and implications of regulating parent-to-child racist speech.

*parent-to-child racist speech can be regulated without violating either a parent's right to free speech or a parent's right to control the upbringing of her child.*

## CHILDREN AND RACISM IN THE REAL WORLD

At a county fair, a young girl sings sweetly in front of a small crowd:

Well sit down and listen, to what I have to say.  
Soon will come a great war, a bloody but holy day.  
And after that purging our people will be free,  
and sing up in the bright skies, a sun for all to see.

Times are very tough now for a proud White man to live. And although it may appear that this world has no life to give. Times are soon changing, this can[']t go on [f]or long. And on that joyful summer's day, we'll sing our Victory song.<sup>27</sup>

In another part of the country, a young boy comes home after school and becomes a virtual Klansman, killing Blacks, Latinos, and Jews in an "ethnic cleansing" video game.<sup>28</sup> Somewhere else, a child creates a kid's page for his father's hate group's web site.<sup>29</sup> A six-year-old African-American boy riding on a school bus sees a group of white men and women through the window and proclaims, "I hate white people."<sup>30</sup> Somewhere else, a group of middle-school children paints swastikas on cars in a predominantly Jewish neighborhood.<sup>31</sup> A group of high-school students is on trial for brutally beating a young girl because of her race.<sup>32</sup>

The aforementioned acts, based on real events, invoke a response of sadness for the child, rather than revulsion. This response to children exhibiting racist tendencies stems from a sense that the racist child has been robbed of the innocence of childhood, and that the adult that she becomes will have been robbed of opportunities as she matures down a path already paved for her. Although there are many factors that cause a child to hate another based on race,<sup>33</sup> this article addresses only parental influence.<sup>34</sup> This article sets out to determine whether the State may prevent harm to a child and to society from parents who pass racist hatred down to their children. This section begins with a description of the legal arenas in which the State may wield its power to restrict racist parental indoctrination.

### SOCIAL CONTEXT: INHERITING RACISM

Parents pass down many things to their children: genes, personality traits,<sup>35</sup> values, oral histories.<sup>36</sup> Some parents pass down racism to their children through racist speech.<sup>37</sup>

For the purposes of this article, racist speech is hate speech that targets groups or individuals based on race. There are several defining characteristics of hate speech.<sup>38</sup> First, hate speech sends a message of hatred or contempt. Second, hate speech usually conveys a message of inferiority. Third, its message targets a specific group or an individual because she is a member of that group. Racist speech includes racial threats, slurs, epithets, symbols, depictions, and "sanitized racist comments."<sup>39</sup>

The effect on a child of growing up in a racist home has not generated much scholarly work and a need exists for a larger body of social science and legal research on this topic. How-

ever, some observations can be gleaned from the field of developmental psychology and research on racism in general. Available research indicates that "[a]ttitudes of prejudice begin to form between the ages of 3 and 4 years, with immediate family members having the most profound effect on the development of attitude and values."<sup>40</sup> Moreover, younger children have a decreased cognitive ability to discern reasonable from unreasonable information, making them more susceptible to racist speech.<sup>41</sup> Thus, racism should have a more profound effect on children, especially younger ones, than on adults. It is with an eye sensitive toward this impressionability of young children to racist speech that we turn to discuss racism's effect on the racist speaker.

Hate is a defining characteristic of racist speech. Hate is a "complex, affective state alloyed with aggression. It is aroused by the experience of frustration and, in its most stark and uncompromising manner, by events that are felt to threaten life."<sup>42</sup> Within the psychiatric community, there has been debate over whether extreme racism is a serious mental illness. Some psychiatrists propose its inclusion in the *Diagnostic and Statistical Manual of Mental Disorders*.<sup>43</sup>

Those who argue that racism is a mental illness explain that "[extremely racist] patients experience problems of impulse disturbance. This disinhibition may activate *inculcated, socially learned, biased beliefs*; adverse cognitive appraisals and stereotypes; hostile behaviors toward out-group persons; or some combination of these things."<sup>44</sup> Children, who have lower impulse control relative to adults, are therefore more prone to act upon racist beliefs. Researchers have also discovered psychological and physiological problems associated with clinical racism: "[f]requent clinical problems include lability, hypo-mania, and marked anxiety. Additionally, these patients evidence relational deficits. Psychotherapy patients who expressed biased attitudes toward members of cultural out-groups . . . also had higher ratings for . . . paranoid, borderline, and antisocial personality disorders, when compared with other psychotherapy patients."<sup>45</sup>

While there is no conclusive evidence that learning racism causes psychological or physiological harm to the racist, the law does not always require conclusive evidence in order to protect children from likely harm.<sup>46</sup> Moreover, racial bias has a severe impact on the social competence of the racist:

For patients who evidence severe forms of bias, inter-group contact is predictably aversive. For these patients, out-group persons are often seen as threatening. For some clinically biased patients, the solution is avoidance. Other patients experience marked anxiety, and yet others express overt hostility. . . Pathologically biased patients may engage in overtly hostile behaviors in benign intergroup situations.<sup>47</sup>

An inability to engage in culturally diverse interactions is also a practical disability. It prohibits the child and future adult from fully participating in society, inhibiting even the most basic activities, such as going to the grocery store, workplace, or voting booths.

Parents who instill racist beliefs in their children contribute to their children's feelings of threat, anxiety, and fear. For example, most members of the American white racist movement believe that "they, as White men, are members of an endangered species."<sup>48</sup> Racist parents strip their child of any sense of personal security.<sup>49</sup> The fear instilled by racist parents goes

beyond teaching a child to be cautious about talking to strangers or crossing the street. Whereas there is a rational basis to fear crossing the street, the fear of people of another race is irrational.<sup>50</sup> Further, racism not only instills fear, but also creates contempt and hatred. It is the combination of both fear and hatred that harms the child.

Some members of the psychiatric community have argued that teaching racism to a child is a form of psychological abuse, which constitutes child abuse in some States.<sup>51</sup> Psychological abuse is “sustained inappropriate behaviour which damages, or substantially reduces, the creative and developmental potential of crucially important mental faculties and mental processes of a child . . . [including] intelligence, memory, recognition, perception, attention, language and moral development.”<sup>52</sup>

One reason offered to show that racist indoctrination is psychological abuse is that it adversely affects a child’s moral development. For example, “children taught to hate are prevented from incorporating the desirable virtues of tolerance, reverence for life, respect for individual differences and mutual understanding,” causing these children to “suffer an arrest in their moral development.”<sup>53</sup> Recent neurobiology studies have also linked early childhood psychological abuse to abnormalities in brain development.<sup>54</sup> Thus, parent-child hate indoctrination may have an irreversible effect on a child’s developing brain.

A related concern is that children who are taught to hate will later commit hate crimes. While no definitive link has been shown between racist indoctrination during childhood and hate crimes, it is estimated that 70% of all hate crimes are committed by juveniles.<sup>55</sup> One possible reason for this statistic is that young people are more likely to act on racist beliefs than adults.<sup>56</sup>

The power of the State to interfere with a parent’s decision to raise her child as a racist person rests on the availability of legal forums in which the State can exercise its power, the type and degree of the parent’s racist behavior, and the extent of harm the behavior has on the child. The next section discusses the jurisprudence that has developed around the State’s ability to interfere with the family.

## LEGAL CONTEXT

The State plays several substantial roles in protecting and supporting children.<sup>57</sup> Under the child protection umbrella, the State provides services ranging from family counseling to parenting education,<sup>58</sup> and it governs the removal and termination of parental rights.<sup>59</sup> Under the family dissolution umbrella, the State may determine custody of a child, limit visitation rights, and order a parent to behave in a specific way to retain custody of a child. Through public assistance, the State aids a parent in supporting her child. In addition, the State influences a child’s upbringing by providing public education and mandating medical care.<sup>60</sup> Each of the aforementioned roles potentially provides the State with the opportunity to interfere with a parent’s decision to teach racism to her child.<sup>61</sup> However, as State intervention is often tied to family failure or dysfunction,<sup>62</sup> parents of intact families may be granted more freedom to teach racism to their children, and children of intact families may not be appropriately protected from racist indoctrination.

Today, some courts consider a parent’s use of racist speech as a factor in determining custody and visitation rights.<sup>63</sup> In *In re Bianca W.F.*,<sup>64</sup> the Superior Court of Connecticut found

that “the father’s use of racial slurs or derogatory racial references” in front of the children constituted a “continuing form of neglect of the children’s educational and moral needs.”<sup>65</sup> Courts have also ordered parents not to use specific racist language in front of their children.<sup>66</sup> While this practice has largely escaped the notice of all but a few First Amendment scholars,<sup>67</sup> this article argues that prohibiting or restricting a parent from teaching her child to hate is constitutionally permissible. The contrary view is that the consideration of speech in such proceedings is impermissible because it violates free speech and substantive due process.<sup>68</sup> The debate survives partly because of the little attention paid to family law proceedings.<sup>69</sup>

Today, amidst war, increasing intolerance of immigration, and rising hate crime statistics, racist indoctrination of children by parents must be examined. The State can and should use its power to protect children from such indoctrination.

## II. SUBSTANTIVE DUE PROCESS: BALANCING RIGHTS

Three interests are implicated when the State interferes with a parenting decision: (1) the parents’, (2) the State’s, and (3) the child’s.<sup>70</sup> A court will weigh these interests to determine whether a State statute or action infringes on a parent’s constitutional right.

The ability of the State to interfere with a parent’s right to teach her child racism depends, first, on the relative importance assigned to the parent’s right to control the upbringing of her child. The United States Supreme Court has found that a parent’s right to raise her child is a fundamental right.<sup>71</sup> This fundamental right of the parent to raise her child as she sees fit rests on a presumption that parents act in the best interests of their children.<sup>72</sup> The parental right in part derives from the child’s interest in being taken care of properly; however, real world experience calls into question the validity of the presumption that parents always act in their children’s best interest.

The Court has also recognized that the State has the authority to intervene when a child’s welfare is at stake. The State has greater power over children than it has over adults because “[a] democratic society rests, for its continuance, upon the healthy, well-rounded growth of young people into full maturity as citizens, with all that implies.”<sup>73</sup> The State may interfere with the parent-child relationship where necessary to protect the welfare of the child or to educate future citizens.<sup>74</sup>

The State’s ability to impose itself into the parent-child relationship derives not only from its own interest in protecting its citizens, but also from the unique constitutional status of the child. A child has constitutional rights, but not to the extent that adults do.<sup>75</sup> The limitations on a child’s rights are explained by the unique characteristics of childhood. For example, the child’s underdeveloped cognitive processes limit a child’s ability to make appropriate decisions about her life. Young children “are not able to think abstractly, have a limited future time sense, and are limited in their ability to generalize and predict from experience.”<sup>76</sup> For this reason, the law restricts a minor’s choice to marry,<sup>77</sup> engage in sexual activity with adults,<sup>78</sup> consume alcohol, and vote in elections.

It is often unclear how a parent’s right to control the upbringing of her child ought to be balanced against the State’s interest in protecting the well-being of the child and the child’s individual rights. The Supreme Court has failed to define the



scope of the parental right to control the upbringing of children.<sup>79</sup> States have largely filled in this gap on a case-by-case basis.<sup>80</sup> Legal scholars and social scientists have also weighed in. One view is that a parent should not have a fundamental right to control the upbringing of her child at all.<sup>81</sup> A more common view—that a parent should have some rights—stops short of relegating the child to parental property.<sup>82</sup> Under this view, a parent should make decisions about her child with limited State interference for several reasons: (1) a child cannot support herself or make important decisions; (2) optimal child rearing includes intimate and continuous relationships; (3) parents are in the best position to know what is best for the child, and they care more about their child than anyone else; and (4) parents have traditionally held these rights.<sup>83</sup> Additionally, some commentators justify parental rights by noting that parents have a personal interest in molding their children in accordance with their desires and ideals.<sup>84</sup> The issue of parent-child racist speech falls into the gray area of parent-child-state jurisprudence.

#### SCOPE OF PARENTS' FUNDAMENTAL RIGHT

Two of the earliest cases to recognize the right to parent were *Meyer v. Nebraska*<sup>85</sup> and *Pierce v. Society of Sisters*.<sup>86</sup> Both cases involved parents' right to educate their children as they see fit. *Meyer* addressed a Nebraska statute that prohibited the teaching of foreign languages, with the exception of Latin, Greek, and Hebrew, to school children below the eighth grade.<sup>87</sup> The purpose of the statute was to "promote civic development" by ensuring that children "learn English and acquire American ideals" before they are educated in foreign languages and ideals.<sup>88</sup> The plaintiff, a parochial school teacher, was convicted under the statute for teaching a ten-year-old student to read German.<sup>89</sup> The Court struck down the statute as unconstitutional for unreasonably interfering with three interests: the "calling of modern language teachers," the "opportunities of pupils to acquire knowledge," and the "power of parents to control the education" of their children.<sup>90</sup> The Court was also concerned that the statute would disadvantage the foreign-born segment of the population<sup>91</sup> absent proof that learning foreign languages harmed the health or well-being of a child.<sup>92</sup> In *Meyer*, the Court noted that teaching a child German was not in fact harmful and that there was some evidence that it was actually helpful to a child.<sup>93</sup>

*Pierce v. Society of Sisters* also recognized a parent's right to control the upbringing of her child.<sup>94</sup> In *Pierce*, the Court struck down an Oregon statute that required all parents and guardians of children between the ages of eight and sixteen to send their children to public school.<sup>95</sup> Two private schools challenged the statute on the basis that compulsory public school attendance threatened business.<sup>96</sup> The Court rested its decision on the statute's impermissible interference with the plaintiff's property rights.<sup>97</sup> In reaching its decision, however, the Court found the statute was not a proper exercise of State power because it unreasonably and arbitrarily interfered "with the liberty of parents and guardians to direct the upbringing and education of children under their control."<sup>98</sup> The Court reasoned that the

underlying purpose of the parental right is "to recognize and prepare him for additional obligations."<sup>99</sup> According to the Court, "[t]he child is not the mere creature of the State."<sup>100</sup> The State thus has a limited role in raising a child.

*Meyer* and *Pierce* both suggest that the parent's interest in controlling the upbringing of her child can outweigh the State's interest. Later cases reinforced the fundamental right of a parent to control the upbringing of her child.<sup>101</sup> In 2000, in *Troxel v. Granville*, the Court struck down a Washington statute that allowed a judge to override a parent's decision not to allow third-party visitation with her child.<sup>102</sup> The plurality reaffirmed the presumption that fit parents act in their children's best interest.<sup>103</sup> The Court recognized the parental interest in the care, custody, and control of their children as "perhaps the oldest of

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*the limit on a parent's fundamental right and the State's powerful interest in protecting the well-being of its children leaves room for the State to intervene when a parent's racist speech harms the child's mental health, public safety, or peace and order.*

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the fundamental liberty interests recognized by the Court."<sup>104</sup> The broad nature of the statute<sup>105</sup> and the failure to accord deference to the parent's choice made this statute unconstitutional.<sup>106</sup>

So long as a parent adequately cares for his or her children (*i.e.*, is fit), there will normally be no reason for the State to inject itself into the private realm of the family to further question the ability of the parent to make the best decisions concerning the rearing of that parent's children.<sup>107</sup>

#### LIMITS ON PARENTS' RIGHT

The parental right is not without limits. The State's power to limit a parent's child rearing discretion is at its highest when the child's physical or mental health is jeopardized.<sup>108</sup> The State, however, has the power to interfere even if the parent's decision does not severely jeopardize the child's health. An early case to recognize the limits on parental rights was *Prince v. Massachusetts*.<sup>109</sup> In *Prince*, the Court held that the State's power to ensure that "children be both safeguarded from abuses and given opportunities for growth into free and independent well-developed men and citizens" outweighed the parent's interest.<sup>110</sup> The statute in *Prince* imposed criminal sanctions on guardians who permitted their minor children to sell newspapers or other literature on the street.<sup>111</sup> The plaintiff, a Jehovah's Witness, was charged with violating the statute when she and her niece were distributing religious pamphlets for a suggested donation of five cents.<sup>112</sup> The Court concluded that while the "custody, care and nurture of the child reside first in the parents," the State can override the parent's right in order to guard the child's well-being,<sup>113</sup> which may include "matters of conscience and religious conviction."<sup>114</sup> State power over matters of conscience strengthens its ability to regulate parent-child hate indoctrination, which is largely a matter of conscience.

Thus, the limit on a parent's fundamental right and the State's powerful interest in protecting the well-being of its children leaves room for the State to intervene when a parent's racist speech harms the child's mental health, public safety, or peace and order. Even so, before the State may intervene it must overcome a separate constitutional concern: the parent's and the child's right to free speech. This constitutional concern is the focus of the following section.

### III.FREEDOM OF SPEECH

Under the First Amendment, regulating parent-to-child racist speech implicates both the parent's right to speech and the child's right to access speech.

#### CHILDREN AND FIRST AMENDMENT COMMENTARY

*The cognitive, moral, and emotional immaturity of children can render them especially vulnerable to some forms of expression that they are ill equipped to protect themselves from. They depend on others to advance their crucial interests and protect them from harm.*<sup>115</sup>

Over the course of a lifetime, welfare interests wane and liberty interests wax. When a person is born, she cannot care for herself and therefore has the greatest interest in being cared for. As she matures, she becomes better able to take care of herself, so her welfare interest decreases. Liberty interests, or interests in being free, increase as a child grows into an autonomous being. Paternalism is thus less offensive to a child than to an adult.<sup>116</sup>

The scope of the child's right to free speech depends on a balancing of welfare or developmental interests and liberty interests.<sup>117</sup> Developmental interests are comprised of two types of interests: those interests that affect the present well-being of the child and those interests that are held in trust.<sup>118</sup> Describing the present developmental interests of a child, one commentator suggests:

[B]ecause we must show concern for the quality of the experience of childhood, we have reason to insulate children from unsettling materials even if exposure does not result in significant harm . . . We do not augment the quality of children's lives by exposing them to materials that they cannot grasp, but which nonetheless elicit strong unsettling responses from them.<sup>119</sup>

The developmental interests of a child are harmed by racist indoctrination.<sup>120</sup> If a child manifests the psychological and physical effects of clinical racism,<sup>121</sup> her quality of life during childhood is low.

Future-oriented interests are those that "equip children with the habits and capacities for reflective deliberation and self-direction that will permit them to live successful and responsible adult lives."<sup>122</sup> If an activity harms a child's ability to develop a sense of justice or hinders growth of deliberative faculties, then the child's developmental interests are harmed.<sup>123</sup> It is in this sense that it can be said that hate speech indoctrination has a "silencing effect" on the child. "If children are to become the sort of beings for whom full rights of free expression are valuable, then the moral capacities on which the value of these rights depends must be suitably nurtured and developed."<sup>124</sup> Indoctrinating a child with racist hate or fear of race extinction silences future speech, thus degrading the interest that the First Amendment was meant to protect. While most of the scholarship discussing First Amendment rights during childhood primarily addresses children's access to obscenity and violence, much of the

argument is applicable to hate speech. There is a presumption in much of the scholarship that the State and parents agree that children should not be subject to obscenity and violence, or that the State can regulate only in situations where the parent invites such intervention.

Kevin Saunders discusses the effect on a child of learning hate speech,<sup>125</sup> arguing that "a racist child is of questionable psychological health, and the existence of hate-based crime demonstrates the danger of racism to community safety, so attempts to teach racism to children harm both the psychological health of children and the physical safety of society."<sup>126</sup> Saunders focuses on the constitutionality of prohibiting third parties from teaching racism to a child. In developing his thesis, however, he states without analysis that the State would have no right to interfere if the parent wanted the child to receive hate material from a third party.<sup>127</sup> This article rejects that argument because it fails to consider the State's two distinct interests in protecting a child: a *parens patriae* interest and an interest in aiding the parent. Saunders thus overlooks the ability of the State, as *parens patriae*, to protect the child from receiving racist information even when the parent wants the child to receive the information.

The Supreme Court recognized the two interests of the State in *Ginsberg v. New York*, in which the Court upheld the conviction of a luncheonette owner for selling sexually explicit magazines to a minor, in violation of New York law.<sup>128</sup> The Court identified two legitimate interests that granted the State the power to restrict children's access to speech. The first interest is the State's "independent interest" in fulfilling its *parens patriae* function—in protecting the well-being of its youth and in seeing "that they are safeguarded from abuses which might prevent their growth into free and independent well-developed men and citizens."<sup>129</sup> The second interest is the State's function in aiding parents in their role of parent.<sup>130</sup> The first interest is most salient in determining the State's power to interfere with parental discretion.

Restricting a parent's ability to transmit racism to their children serves the State's *parens patriae* interest when the child's well-being is harmed and her ability to grow into an independent, well-developed citizen is hindered by the parent's racist ideas. For example, the *parens patriae* interest is served by protecting a young child from being taught songs that call for a racial holy war and pro-

claim the inferiority of other races. The developmental effects of racism on a child, which support this assertion, are discussed in Part I.

Modern cases that restrict a child's access to harmful information must deal with the effect that any restriction may have on adult access to information.<sup>131</sup> *FCC v. Pacifica Foundation* recognized that children can be protected from offensive speech by restricting broadcasting of offensive speech to hours when children will not likely be listening.<sup>132</sup> Unlike restricting a radio broadcast to certain hours, which may potentially affect a large number of willing adult radio listeners, restricting a parent from teaching racism to her children will have only a nominal effect on third-party adults. Any restrictions would affect only a parent's speech to her own child. It is likely that no one but the parent and child will be affected by the restriction.

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## NO MARKET PLACE FOR CHILDREN

An abundance of scholarship has been dedicated to explaining why speech must be protected from government regulation. The first justification is that free speech unearths the truth.<sup>133</sup> Justice Holmes argued that free speech is essential to finding truth and that only through a clash of ideas can truth be attained.<sup>134</sup> According to Holmes, “the best test of truth is the power of the thought to get itself accepted in the competition of the market.”<sup>135</sup> John Stuart Mill, British philosopher and political economist, provided a similar justification for protecting speech:

[T]he peculiar evil of silencing expression of an opinion is, that it is robbing the human race; posterity as well as the existing generation; those who dissent from the opinion, still more than those who hold it. If the opinion is right, they are deprived of the opportunity of exchanging error for truth: if wrong, they lose, what is almost as great a benefit, the clearer perception and livelier impression of truth, produced by its collision with error.<sup>136</sup>

Suppressing speech would have the unintended ramification of driving speech underground and effectively allowing bad ideas to “smolder,” rather than being ousted through opposition.<sup>137</sup> Consistent with the marketplace of ideas is the argument that offensive speech should be combated with more speech rather than with censorship.<sup>138</sup>

The marketplace of ideas argument has been criticized on several grounds.<sup>139</sup> First, proponents of the market-failure model argue that there are inequities in the speech market, such as lack of media access, that create a need for market intervention.<sup>140</sup> Second, critics argue that absolute protection of speech is unjustifiable even though “truth” may eventually prevail because the harm caused in the short term is too great.<sup>141</sup>

In the context of speaking to a child, the marketplace of ideas is untenable. First, children “lack the experiential basis of adults and are more likely to be led astray.”<sup>142</sup> They often lack the capacity to distinguish poorly reasoned ideas from well-reasoned ideas.<sup>143</sup> The marketplace theory presupposes that the “buyers” of ideas will have the capacity to reason. Thus, where the “buyers” in a market are children, the truth is less likely to surface, if at all. Our society acknowledges that a child has no real bargaining power and cannot be counted on to make serious decisions responsibly. This is exemplified by the fact that children are shielded from other free markets as well (e.g., children may not work, buy cigarettes or alcohol, or obtain a credit card).

Second, with respect to children, the marketplace of ideas is not competitive. Parents are the major source of ideas for young children, especially those who are home-schooled or isolated. If prejudices begin to form around three or four years of age, being exposed to different ideas in school after age three or four will not successfully correct the bias.<sup>144</sup> Just as there is skewed access to media for adults,<sup>145</sup> parents occupy a disproportionate market share when it comes to their children.

The second justification for free speech is that it acts as a check on abuse of governmental authority by enabling people to speak out against the government and reveal truths about

those who have political power.<sup>146</sup> One view is that this justification survives when applied to parent-to-child speech: “Government power to coercively restrict parental speech, on top of its power to engage in its own speech in public schools, would tend to cement existing orthodoxies and suppress potentially valuable but unpopular ideas.”<sup>147</sup> This argument misses the point that whatever value the expression of potentially valuable but unpopular ideas may have, this value is lost on children who are unable to comprehend the information. When a child reaches maturity, a parent’s racist speech will be less harmful to the child, and thus such “unpopular ideas” will not be absolutely prohibited.

The third justification for free speech is that a democracy relies on the ability of its members to debate political issues and make informed choices. Free expression must be the centerpiece of self-government. The self-governance argument<sup>148</sup> suggests that “[s]elf-government can exist only insofar as the voters acquire the intelligence, integrity, sensitivity, and generous devotion to the general welfare that, in theory, casting a ballot is assumed to express.”<sup>149</sup> When we are speaking of those who do not participate in the political process, however, this argument is not persuasive. Because children are not allowed to vote, the political process is not weakened by restricting adults from expressing political ideas to children. This is especially true for very young children who do not possess the cognitive ability even to understand political ideas. Of course, children become future voters, so there is an interest in preparing them for their political role by exposing them to diverse beliefs when they are capable of understanding them. However, these goals are furthered by preserving the autonomy of future generations of voters, not by indoctrinating with racist hate. Where a child has been taught to hate, she will not be in a position to make informed choices, for her ability to make choices based on reason, rather than on preprogrammed fear and contempt, will have been impaired.

A non-instrumental justification for protecting speech is that it respects individual autonomy and nurtures certain beneficent character traits.<sup>150</sup> According to this view, the practice of tolerating offensive speech rather than punishing it serves the individual and society by providing a forum for people to exercise their “capacity for tolerance,” which translates generally into a disposition of restraint and self-denial.<sup>151</sup> For example, “[s]imply coexisting and overcoming the wish to establish an overly homogenized society are important goals,” and “free speech may simply function as a zone of extreme tolerance, not because the behavior tolerated is important to human self-realization or to truth, but because as a practical matter living with divergent behavior is necessary.”<sup>152</sup> It is inapposite, however, to argue that teaching children to hate based on race creates a general atmosphere of tolerance on the playground. An adult racist arguably has chosen to be racist. Thus, it makes sense to suggest that forcing one to hear another’s racist beliefs may create a more tolerant society. Unlike racist speech among adults, allowing children to be indoctrinated for the sake of nurturing a tolerant society sacrifices the well-being of the child for the mere possibility that a tolerant society will emerge. This sacrifice is too costly.

One argument against the absolute protection of hate speech that is relevant to parent-to-child hate speech focuses on the expressive function of the law. In the hate speech context, the proponents of this view argue that by protecting hate speech, the law endorses of hate speech. This argument is even more

persuasive when applied to parent-to-child hate speech. A child, with a developing identity and a developing sense of self, may look to the law as guidance on what society approves. By permitting a parent to teach racist hate to a child, the law implies societal approval and even suggests encouragement of prejudicial ideas.<sup>153</sup>

### CONTOURS OF FREE SPEECH DOCTRINE

The most basic and inaccurate interpretation of the First Amendment is that it is absolute, that it protects all speech.<sup>154</sup> Until 1931, the First Amendment applied only to Congress.<sup>155</sup> Thus, free speech protections were once much more limited than most people have come to expect.<sup>156</sup> The key to assessing and predicting the constitutionality of certain speech regulations lies in navigating the turbulent waters of free speech rules and exceptions. One of the most important rules in First Amendment jurisprudence is that speech restrictions must be both content and viewpoint neutral:

[A]bove all else, the First Amendment means that government has no power to restrict expression because of its message, its ideas, its subject matter, or its content . . . [T]here is an 'equality of status in the field of ideas,' and government must afford all points of view an . . . opportunity to be heard.<sup>157</sup>

The regulation of parent-to-child racist speech violates the content-neutral requirement. One could argue that the restriction derives from the harm it causes to children and not its message, but that argument masks the true motivation.<sup>158</sup> Even if the regulation is content-based, the captive audience doctrine may allow the speech to be regulated.

The Supreme Court has identified a hierarchy of protected speech based on the value of the speech.<sup>159</sup> The speech with the highest value is political speech because there is "practically universal agreement that a major purpose of the First Amendment was to protect the free discussion of governmental affairs."<sup>160</sup> Political speech "includes discussion of candidates, structures and forms of government, the manner in which government is operated or should be operated, and all such matters relating to the political process."<sup>161</sup> Restrictions on this category receive strict scrutiny, the most stringent protection under the First Amendment. Speech with lower value, such as obscenity<sup>162</sup> and commercial speech,<sup>163</sup> is easier for the government to regulate.

Thus, a relevant question is whether parent-to-child racist speech is high-value or low-value speech. Some racist speech carries a political message and therefore should be considered high-value speech, although perhaps not as valuable as speech directly concerning a political campaign. On the other hand, some parent-to-child racist speech (e.g., speech regarding the social characteristics of a race and degrading speech) may not be political speech and should receive lesser status. However, a viable argument may be made that no speech to a child is political speech because a child cannot comprehend such political ideas. Even if parent-to-child racist speech is considered to be of lower value, the Supreme Court has held that content-based regulations of unprotected speech must still meet strict scrutiny.<sup>164</sup> In sum, parent-to-child racist speech regulations that restrict political speech based on content place an extremely

high burden on the government to overcome. That burden may be overcome by the captive audience doctrine.

### FREEDOM FROM BEING CAPTIVE TO RACIST SPEECH<sup>165</sup>

*[A] child—like someone in a captive audience—is not possessed of that full capacity for individual choice which is the presupposition of First Amendment guarantees.*<sup>166</sup>

Under the captive audience doctrine, speech is exempted from First Amendment protection if it is delivered to a captive listener.<sup>167</sup> The exception potentially allows the Court to sidestep the content-neutrality requirement of the First Amendment and to curtail political expression.<sup>168</sup>

A captive audience, in the First Amendment sense, describes listeners who, under certain circumstances, cannot escape offensive language.<sup>169</sup> The degree and type of captivity necessary to invoke this doctrine is often a central point of contention and confusion.<sup>170</sup> Critics first point to the ambiguity of the word "captive," arguing that "[w]e are always captive in some senses, and never captive in others . . . [W]e are virtually never captive, because there is almost always something we can do to avoid exposure to whatever we find most offensive."<sup>171</sup>

The more central problem in employing this doctrine, however, is that the Court has been unclear in its application of the doctrine.<sup>172</sup> It is difficult to find guiding language in case law or a common thread among cases that apply the captive audience doctrine.<sup>173</sup> For example, the Court has found people entering health facilities captive to anti-abortion protests.<sup>174</sup> It has also found a person riding in a car or at home listening to the radio captive to an offensive radio broadcast;<sup>175</sup> a homeowner captive to focused residential picketing;<sup>176</sup> a homeowner captive to sexually oriented mailings that she has requested not to receive;<sup>177</sup> and a public bus rider captive to political campaign advertising on the bus.<sup>178</sup> It is difficult to discern an identifiable pattern from which a person can determine whether the captive audience doctrine should apply in a specific case.

Several concepts have been offered to make sense of First Amendment captivity.<sup>179</sup> The first basic concept is that the captive audience doctrine is founded upon preserving "the right to be let alone" or "the right to privacy."<sup>180</sup> Two principles underlie this right: an autonomy interest and a right to repose.<sup>181</sup> The second concept is that the State has an interest in protecting the privacy rights of an unwilling listener.

The autonomy principle is common to both the right to free speech and the right to privacy. Being free to speak one's mind nurtures and preserves individual autonomy.<sup>182</sup> Likewise, being able to choose the ideas and thoughts to which one is exposed nurtures and preserves individual autonomy.<sup>183</sup> Despite the various plausible definitions for the word "captivity," at its core, captivity suggests that a captive person is one who is deprived of autonomy or meaningful choice. With that definition in mind, the captive audience doctrine can be understood as a tool that balances power between the captor and the captive in order to restore individual autonomy.<sup>184</sup>

These underlying principles reveal that the goals of the First Amendment and the right to privacy are not in conflict: by placing a premium on autonomy, both require protection of the child from racist indoctrination. Because the young mind is so easily, and often irreversibly, shaped, parent-to-child racist speech disturbs the autonomy of the future adult. The State has

an interest in protecting the autonomy rights of the future adult disturbed by such speech.

In addition to the right to make individual choices, the right to be let alone is concerned with the right to repose or to be at peace. This right is most often violated when a person is being disturbed at home. This is so because if she cannot retreat to her home, there may be nowhere to retreat at all. Consequently, the home has a special status in captive audience jurisprudence.<sup>185</sup> The right to repose in one's home has a strong implication for parent-to-child racist indoctrination because such communication likely occurs in the home. Thus, the child has nowhere to retreat from unwanted racist inculcation. In sum, both the child's autonomy interest and the child's right to repose the two interests the captive audience doctrine endeavors to protect will be served if the captive audience doctrine is applied to the parent-to-child hate speech paradigm.

The State also has an interest in protecting the unwilling listener. In the parent-to-child hate speech paradigm, the child may seem to be a willing listener. Being willing, however, presupposes that the listener has a choice. In the parent-to-child model, the child has no choice and is therefore presumptively unwilling. A young child is truly captive to her parents.<sup>186</sup> She cannot decide to be born, to be born into a particular family, or to be provided with a particular level of care.<sup>187</sup> In addition, "[w]hatever chance [she] may have at achieving autonomy depends on the emotional and material resources invested during [her] childhood."<sup>188</sup> Because a child is dependent upon her guardian<sup>189</sup> for everyday necessities, a child has no choice but to listen.<sup>190</sup> In that sense, a child is powerless to turn off harmful speech.

## CONCLUSION: WAIT UNTIL THEY'RE OLDER

Free speech and a parent's right to control the upbringing of her child are two of the most important rights granted by the United States Constitution. Both rights protect and reflect autonomy and privacy. They secure a profound sense of liberty, under which this country has flourished. At the same time, both rights have limitations founded on a basic principle of collective well-being. Those limitations are at its strongest when the well-being of a child is at stake. While a child is not a mere creature of the State, neither is a child a mere creature of her parents. The reality is that some parents do not act with the best interests of their child in mind. As social science research suggests, a parent who raises her child as a racist does not act in the best interests of her child. Therefore, a parent's right to control the upbringing of her child may be limited by the State's power to protect the child's well-being.

The State's power to restrict a parent from indoctrinating her child is governed by both the free speech doctrine and the substantive due process doctrine. Under the best-interests-of-the-child standard, the State may interfere with a parent's right to control the upbringing of the child, though the State action must meet strict scrutiny to prevail on constitutional

grounds. The precise scope of the State's power under this standard is unclear and is largely within the court's discretion. Wide discretion in this area may be problematic because it leaves it up to a judge, with little guidance, to decide what is best for the child.

Under the captive audience doctrine, a state may have the power to limit a parent's racist speech to her child because the child is captive to her parent's speech. The main theoretical obstacle to regulating parent-to-child hate speech is that it interferes with one of the central tenets of free speech: the content and viewpoint-neutrality requirement. It is not up to the government to prescribe orthodoxy. Proscribing parent-to-child hate speech can be considered a viewpoint-neutral restriction—that is, *no one* can teach their children to hate. Even if the neutrality requirement is not met, the captive audience doctrine may allow the State to bypass the requirement when the child is deemed captive to her parent's hate speech.

There are also several practical obstacles that must be addressed if the State is to regulate parent-to-child hate speech. First, the State may not be in a position to know what a child is learning in the home. A possible answer to this obstacle would be to treat parental racist indoctrination as akin to child abuse. Like child abuse, there are physical and verbal manifestations of racism. A second related obstacle is finding a plaintiff to assert the child's rights in court. A possible solution is that, as in child abuse cases, the State could assert the child's rights. A next friend or a guardian ad litem can be assigned.

Even if a way to enforce a regulation or rule is found, there is the potential that the restrictions will disproportionately affect divorced parents, single parents, or African-American parents because of their overrepresentation in the legal system. Affording a judge broad discretion may also lead to inconsistent application.

Another obstacle to regulating parent-to-child hate speech is the ability to find an appropriate remedy. Absent other evidence of abuse, separating a child from her parent may be too extreme, especially when such separation is based on inconclusive science and inconsistent application of the law. A practical response would instead be a judicial order not to use specific language in front of the child or mandatory enrollment in a tolerance workshop for the parent and child.

This article is just a small step toward the goal of protecting children from their parents' racist indoctrination. It sets forth a possible goal, though one with many well-intentioned legal obstacles in the way.

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<sup>1</sup> Arthur Schopenhauer, *Psychological Observations*, in *STUDIES IN PESSIMISM: THE ESSAYS OF ARTHUR SCHOPENHAUER* 29 (T. Baily Saunders trans., London Swan Sonnenschein & Co. 3d ed. 2004).

<sup>2</sup> The focus of the paper is racist hate speech. A similar argument could be made for other forms of hate speech, such as that based on gender, religion, nationality, and sexual orientation. Some examples used in this paper include other forms of hate speech.

<sup>3</sup> Throughout this paper, “regulations” will refer to statutorily and judicially imposed prohibitions, limitations, and restrictions.

<sup>4</sup> Racist speech passed on from parent to child encompasses a wide range of activity. See discussion *infra* Part II.

<sup>5</sup> *Whitney v. California*, 274 U.S. 357, 375 (1927) (Brandeis, J., concurring).

<sup>6</sup> The First Amendment provides that “Congress shall make no law . . . abridging the freedom of speech.” U.S. CONST. amend. I. The First Amendment applies to States as well as to Congress. See *Gitlow v. New York*, 268 U.S. 652, 666 (1925) (“For present purposes we may and do assume that freedom of speech and of the press—which are protected by the First Amendment from abridgment by Congress—are among the fundamental personal rights and ‘liberties’ protected by the due process clause of the Fourteenth Amendment from impairment by the States.”).

<sup>7</sup> OWEN M. FISS, *THE IRONY OF FREE SPEECH* 12 (1996) (“The First Amendment should be first, they argue . . . [But] [t]he firstness of the First Amendment appears to be little more than an assertion or slogan.”).

<sup>8</sup> *Id.* at 5 (“The First Amendment—almost magisterial in its simplicity . . .”).

<sup>9</sup> Henry Louis Gates, Jr., *War of Words: Critical Race Theory and the First Amendment*, in *SPEAKING OF RACE, SPEAKING OF SEX: HATE SPEECH, CIVIL RIGHTS AND CIVIL LIBERTIES* 17, 18 (1994) (“[I]f America has a civic religion today, the First Amendment may be its central credo.”); CATHARINE MACKINNON, *ONLY WORDS* 76-77 (1993) (“[T]hose who embrace [free speech] think it is their own personal faith, their own original view.”).

<sup>10</sup> See STEVEN H. SHIFFRIN, *THE FIRST AMENDMENT, DEMOCRACY AND ROMANCE* (1990). Other commentators have rejected the romanticized notion of free speech. See Daniel A. Farber, *Free Speech Without Romance: Public Choice and the First Amendment*, 105 HARV. L. REV. 554, 555 (1991).

<sup>11</sup> American children, at least where the author grew up, defend their words by invoking the First Amendment. Two typical retorts are “It’s a free country” and “Sticks and stones may break my bones, but words can never hurt me.” See GATES, *supra* note 9, at 18; MACKINNON, *supra* note 9, at 76 (“Americans are taught this view by about the fourth grade and continue to absorb it through osmosis from everything around them for the rest of their lives.”).

<sup>12</sup> See Chris Demaske, *Modern Power and the First Amendment: Reassessing Hate Speech*, 9 COMM. L. & POL’Y 273, 273 (2004) (“By protecting dissident speech, the First Amendment purports to offer a way for subordinate social groups to participate in political discourse, to hold and exercise power through communication”). Free speech advocates credit the advancement of the civil rights movement to free speech. These advocates point to protesting and prohibiting States from curbing such protests. But see FISS, *supra* note 7, at 12 (“Those favoring liberty often refer to the role that free speech played in securing equality during the 1960s, suggesting that free and open debate is a precondition for achieving a true and substantive equality. But certainly the converse may also be true: that a truly democratic politics will not be achieved until conditions of equality have been fully satisfied.”).

<sup>13</sup> See *Bridges v. California*, 314 U.S. 252, 270 (1941) (“[The First Amendment] is a prized American privilege to speak one’s mind, although not always with perfect good taste.”); MARTHA FINEMAN, *THE AUTONOMY MYTH: A THEORY OF DEPENDENCY*, at xiv (2004) (“[Americans] have a historic and highly romanticized affair with the ideals of the private and the individual, as contrasted with the public and the collective, as the appropriate units of focus in determining social good.”).

<sup>14</sup> European speech laws more strictly regulate hate speech. See, e.g., Karen L. Bird, *Racist Speech or Free Speech? A Comparison of the Law in France and the United States*, COMP. POL. 399, 400 (2000) (“Freedom of speech is more widely protected in the United States than in any other country.”); Kevin Boyle, *Hate Speech—The United States Versus the Rest of the World?*, 53 ME. L. REV. 488 (2001) (discussing the differences between American and foreign governments’ reactions to hate speech); Claudia E. Haupt, *Regulating Hate Speech—Damned If You Do and Damned If You Don’t: Lessons Learned from Comparing the German and U.S. Approaches*, 23 B.U. INT’L L. J. 299 (2005) (providing an in-depth analysis of German and U.S. hate speech regulation and discussing the

utility of comparative analysis as applied to hate speech regulations); Michel Rosenfeld, *Hate Speech in Constitutional Jurisprudence: A Comparative Analysis*, 24 CARDOZO L. REV. 1523 (2003) (providing a comparative analysis of hate speech jurisprudence); Robert A. Sedler, *An Essay on Freedom of Speech: The United States Versus the Rest of the World*, 2 MICH. ST. L. REV. 377 (2006) (exploring the differences between American and foreign governments’ treatment of hate speech).

<sup>15</sup> Lee C. Bollinger, *The Tolerant Society: A Response To Critics*, 90 COLUM. L. REV. 979, 980 (1990) (“Some speech, in fact, has a great capacity for harm.”).

<sup>16</sup> Mari J. Matsuda, *Public Response to Racist Speech: Considering the Victim’s Story*, 87 MICH. L. REV. 2320, 2336 (1989). Psychological harms of being the target of racist speech include feelings of worthlessness, humiliation, isolation, and self-hatred. It may also cause psychological disorders and cause a person to turn to drugs and alcohol as a way of coping with low self-esteem. *Id.* at 2336 n.84. See also Richard Delgado, *Words that Wound: A Tort Action for Racial Insults, Epithets, and Name-Calling*, 17 HARV. C.R.-C.L. L. REV. 133 (1982) (discussing social science research on harms caused by racist speech).

<sup>17</sup> Victims of hate propaganda experience fear, which may manifest as pain in the stomach, rapid pulse rate, difficulty breathing, nightmares, hypertension, and suicide. Matsuda, *supra* note 16, at 2336.

<sup>18</sup> See discussion *infra* Part II.B.

<sup>19</sup> Many scholars have argued that hate speech should be regulated. See, e.g., Charles R. Lawrence III, *Crossburning and the Sound of Silence: Antisubordination Theory and the First Amendment*, 37 VILL. L. REV. 787 (1992) (proposing to inject the principle of antisubordination into First Amendment jurisprudence in order to give a voice to targets of racist speech); Matsuda, *supra* note 16, at 2380 (arguing for a recognition of harms to victims of hate speech caused by both the racist speech itself and by State authorization of such harmful speech). But see Bollinger, *supra* note 15, at 980 (arguing that protecting even the worst and most appalling speech is beneficial to society). For a catalog of neoconservative arguments against regulating hate speech, see Richard Delgado & David Yun, *The Neoconservative Case Against Hate-Speech Regulation—Lively, D’Souza, Gates, Carter, and the Toughlove Crowd*, 47 VAND. L. REV. 1807 (1994).

<sup>20</sup> See, e.g., *R.A.V. v. City of St. Paul*, 505 U.S. 377 (1992) (striking down a hate speech ordinance on the ground that it was not content neutral).

<sup>21</sup> Content neutrality is a key principle of First Amendment jurisprudence. The Supreme Court has consistently held that the First Amendment must protect citizens from speech regulations based on the ideology of its message. See *id.* at 382 (holding that “[c]ontent-based regulations are presumptively invalid”). Hate speech regulation is considered content based because it favors non-racist ideologies over racist ideologies. The implication of this rule is that a content-neutral hate speech regulation would require a regulation that regulates anti-hate speech to the same extent as it regulates racist speech in order to pass constitutional muster. Anatole France illuminates the absurdity of this application: “The law, in its infinite majesty, forbids rich and poor alike from sleeping under bridges.” Quoted in GATES, *supra* note 9, at 32.

<sup>22</sup> The Fourteenth Amendment provides that no State shall “deprive any person of life, liberty, or property, without due process of law.” U.S. CONST. amend. XIV, § 1. See *Troxel v. Granville*, 530 U.S. 57, 65 (2000) (“[T]he interest of parents in the care, custody, and control of their children—is perhaps the oldest of the fundamental liberty interests recognized by this Court.”). Technically, the First Amendment applies to State action through the Fourteenth Amendment liberty interest. *Gitlow v. New York*, 268 U.S. 652, 666 (1925). To avoid confusion in this article, the Fourteenth Amendment and substantive due process will refer only to the right of a parent to control the upbringing of her child and not to free speech.

<sup>23</sup> For example, Judge Nanette Dembitz reveals that “mothers who opposed their daughters’ abortions have expressed a vengeful desire to punish the daughter for her sexual activity by making her suffer [an] unwanted child, a fervor to impose a religious conviction the mother has failed to instill in her daughter, a hope of caring for her daughter’s baby as her own because of an inability or unwillingness to bear another child herself, a defensive or resentful attitude because she bore illegitimate children without seeking or being able to secure an abortion, or a general distaste for abortion.” Kathryn D. Katz, *The Pregnant Child’s Right to Self-determination*, 62 ALB. L. REV. 1119, 1161-62 (1999) (quoting Nanette Dembitz, *The Supreme Court and a Minor’s Abortion Decision*, 80 COLUM. L. REV. 1251, 1255 (1980)).

<sup>24</sup> See *Parnham v. J.R.*, 442 U.S. 584, 603 (1979) (“Nonetheless, we have recognized that a state is not without constitutional control over parental discretion in dealing with children when their physical or mental health is jeopardized.”).

<sup>25</sup> See also *Wisconsin v. Yoder*, 406 U.S. 205, 230 (1972); *Prince v. Massachusetts*, 321 U.S. 158, 166 (1944); *Spiering v. Heinman*, 448 F. Supp.2d 1129

(2006) (holding that a State law requiring parents to get metabolic testing for their infant does not violate the parents' fundamental liberty right to control the upbringing of their child).

<sup>26</sup> Clare Huntington, *Rights Myopia in Child Welfare*, 53 UCLA L. REV. 637 (2006).

<sup>27</sup> This example is based on Prussian Blue, a blond-haired, blue-eyed teenage neo-Nazi singing duo. PRUSSIAN BLUE, *Victory Day*, on FRAGMENT OF THE FUTURE (Resistance Records 2004), available at <http://www.lyrics007.com/Prussian%20Blue%20Lyrics/Victory%20Day%20Lyrics.html>.

<sup>28</sup> Ethnic Cleansing is a video game created by Resistance Records, in which the player can choose to be a skinhead or Klansman. The player runs through the ghetto, killing blacks and Latinos, until finally reaching the "Jewish Control Center." To win the game, the player must assassinate former Israeli Prime Minister, Ariel Sharon. Anti-Defamation League, *ADL Report: Growing Proliferation of Racist Video Games Target Youth on the Internet* (2002), available at [http://www.adl.org/PresRele/Internet\\_75/4042\\_72.htm](http://www.adl.org/PresRele/Internet_75/4042_72.htm). The game's website has posted the following reviews, which I reproduce here without alteration:

Just got my game, E.C. and wanted to say thank's comrades! You have made me so fuckin happy, tear's are rollin off my white face and on to my assault rifle which I must now clean to prevent rust! You bastard's(lol).....I dont want to seem ungrateful but is there any chance of a patch, that can include new's reporter's or gook's? – Nolan

I got a beta test version 4.01 and it was a scream! . . . I made my way down some stairs and went outside, at once, I was being shot at by ghetto groids, I swung into action and blasted the nig, copius amounts of blood spewed from the nig and the sound of the nigs death left me in stitches! The sound is like a monkey being killed by asians for a meal of brains! I proceeded to shoot niggers and spics slowly cleansing the street and vacant lot. I found an ammo store hidden in one of the rooms. . . . I finished cleansing all of level one and destroyed "Big Nig", I made my way to the subway and entered level 2. The place is full of jews, I shoot one of the foul pigs and it said "Oy Vey!" I continued to shoot them, they seem a lot harder to kill than niggers. After cleansing part of the subway I began searching for more life and ammo. I found some in a bathroom but I had to kill 6 or 7 niggers to get to it, and no sooner than the bathroom was cleansed, a jew was in my face with a machine gun! I blasted the kike and made my way back to the platform, I would write more but I need to get back to the game! – Bob. H.

Resistance Records, *Reviews of Ethnic Cleansing: The Game*, <http://www.resistance.com/ethniccleansing/reviews.htm> (last visited May 16, 2007).

<sup>29</sup> This example is based on a well-known leader in the white supremacist movement and his son, who is rumored to have managed a children's website for his father's white supremacist organization.

<sup>30</sup> This event is based on the author's personal experience in Atlanta, Georgia.

<sup>31</sup> This event is based on the author's personal experience in Long Island, New York.

<sup>32</sup> Nine teenagers were convicted in California for the hate-based beating of three women on Halloween night. Greg Risling, *9 Youths Convicted in SoCal Halloween Beating Hate-crime Case*, ASSOCIATED PRESS ST. & LOC. WIRE, Jan. 27, 2007.

<sup>33</sup> There is a wealth of scholarship on factors influencing child development. For a good discussion on such influences, see Laura A. Rosenbury, *Between Home and School*, 155 U. PA. L. REV. 833, 839-840 (2007) (arguing that while influences outside the family and the school contribute to the development of a child, they are "legally invisible"). See also Barbara Bennett Woodhouse, *Reframing the Debate About Socialization of Children: An Environmental Paradigm*, 2004 U. CHI. LEGAL F. 85 (2004); Kenneth L. Karst, *Law, Cultural Conflict, and the Socialization of Children*, 91 CAL. L. REV. 967 (2003) (discussing influences of schools and mass media on children).

<sup>34</sup> A parent's influence on a young child's mind is supported first by common sense and ordinary experience. Although there are arguments to the contrary, this common-sense theory is supported by scientific and psychological research. See discussion *infra* Part II.B.

<sup>35</sup> There is a general consensus that environmental influences, such as parent-child interaction, affect the development of a child. Diane Scott-Jones, *Family Influences on Cognitive Development and School Achievement*, 11 REV. OF RESEARCH IN EDUCATION 259, 260 (1984).

<sup>36</sup> See LINDA TATE, A SOUTHERN WEAVE OF WOMEN: FICTION OF THE CONTEMPORARY SOUTH 280 (The University of Georgia Press) (1994) ("Many voices are in my mouth . . . those of my mothers and grandmothers; and finally my own. The matrix and the voice, the womb and the loom, become one.").

<sup>37</sup> My use of "speech" refers to speech as defined by the First Amendment. See discussion *infra* Part II.B. Jeffrey Evans Stake proposes a "memetic" or evolutionary approach to ideas, which fits nicely into the subject of parent-to-child racist speech. Jeffrey Evans Stake, *Are We Buyers or Hosts? A Memetic Approach to the First Amendment*, 52 ALA. L. REV. 1213 (2001). Stake suggests that ideas, like memes, have the power to replicate. *Id.* at 1214. A memetic approach aims to "prevent memes [ideas] from using harm and threats of harm to their human vessels." *Id.* In the case of parent-to-child racist speech, a parent is a host, intentionally or unintentionally passing harmful memes to her young child. Once passed, those memes draw on the resources of the child, harm her psyche, and continue to replicate.

<sup>38</sup> Demaske, *supra* note 12, at 290 (citing as characteristic of hate speech any message "directed to a historically oppressed group" or "persecutorial, hateful, and degrading").

<sup>39</sup> Sanitized racist comments are those made by people who are educated or economically advantaged that are less vulgar sounding than outright racist speech, but have the same sting (e.g., off-hand comments that members of certain ethnic groups are welfare cheaters). Matsuda, *supra* note 16.

<sup>40</sup> Annie Steinberg, Jane Brooks & Tariq Remtulla, *Youth Hate Crimes: Identification, Prevention, and Intervention*, 160 AM. J. PSYCHIATRY 979, 984 (2003).

<sup>41</sup> *Id.* One study that focused on parents of juvenile offenders indicated that "children tended to identify with their parents' beliefs, thus demonstrating some of the same beliefs, including tolerance of certain groups." *Id.*

<sup>42</sup> *Id.* at 979.

<sup>43</sup> For a discussion of the bias-as-mental-illness debate within the mental health community, see Shankar Vedantam, *Psychiatry Ponders Whether Extreme Bias Can Be an Illness*, WASH. POST, Dec. 10, 2005, at A01. Some psychiatrists have cautioned against classifying extreme racism as a psychological disorder because it may allow perpetrators of hate crimes to claim not guilty by mental insanity at trial. See, e.g., Michael J. Grinfeld, *A Tale of Two Atrocities: Can Psychiatry Handle the Controversy?*, PSYCHIATRIC TIMES, Oct. 1999, at 32.

<sup>44</sup> Edward Dunbar, *Reconsidering the Clinical Utility of Bias as a Mental Health Problem*, 41 PSYCHOTHERAPY: THEORY, RESEARCH AND PRACTICE 97, 98 (2004).

<sup>45</sup> *Id.*

<sup>46</sup> E.g., *Ginsberg v. New York*, 390 U.S. 629 (1968) (declining to require scientific proof of harm to children potentially caused by reading sexually explicit magazines). Because obscenity is non-protected speech, however, the standards for scientific evidence are lower. Parent-to-child racist speech can be interpreted as a higher value speech because of the political message, and therefore may require evidence of harm to a child. See discussion *infra* Part IV.C.

<sup>47</sup> Dunbar, *supra* note 44, at 98 ("For patients who evidence severe forms of bias, intergroup contact is predictably aversive. For these patients, out-group persons are often seen as threatening. For some clinically biased patients, the solution is avoidance. Other patients experience marked anxiety, and yet others express overt hostility. It is not surprising that these patients are interculturally incompetent. Pathologically biased patients may engage in overtly hostile behaviors in benign intergroup situations.").

<sup>48</sup> Raphael S. Ezekiel, *An Ethnographer Looks at Neo-Nazi and Klan Groups: The Racist Mind Revisited*, 46 AM. BEHAV. SCIENTIST 51, 53 (2002).

<sup>49</sup> *Id.*

<sup>50</sup> See generally Susan Feldman, *The Shadow of Difference: Sex, Race, and the Unconscious* (Aug. 2006) (unpublished Ph.D. dissertation, SUNY/Buffalo) (on file with Lockwood Memorial Library, SUNY/Buffalo).

<sup>51</sup> E.g., ALA. CODE § 26-14-1(1) ("[Abuse] . . . can occur through nonaccidental . . . mental injury."); ALASKA STAT. § 47.17.290 ("Mental injury means a serious injury to the child as evidenced by an observable and substantial impairment in the child's ability to function in a developmentally appropriate manner and the existence of that impairment is supported by the opinion of a qualified expert witness."); ARIZ. REV. STAT. § 8-201(2) ("'Abuse' means . . . the infliction of or allowing another person to cause serious emotional damage as evidenced by severe anxiety, depression, withdrawal or untoward aggressive behavior, and which emotional damage is diagnosed by a medical doctor or psychologist, and is caused by the acts or omissions of an individual having care, custody and control of a child."); CAL. PENAL CODE § 11166.05 (Supp. 2008) ("[S]erious

emotional damage [is] evidenced by states of being or behavior, including, but not limited to, severe anxiety, depression, withdrawal, or untoward aggressive behavior toward self or others.”); FLA. STAT. ANN § 39.01(43) (“‘Mental injury’ means an injury to the intellectual or psychological capacity of a child as evidenced by a discernible and substantial impairment in the ability to function within the normal range of performance and behavior.”); N.Y. FAM. CT. ACT § 1012 (“Impairment of emotional health and impairment of mental or emotional condition includes a state of substantially diminished psychological or intellectual functioning in relation to, but not limited to, such factors as failure to thrive, control of aggressive or self-destructive impulses, ability to think and reason, acting out, or misbehavior, including incorrigibility, ungovernability, or habitual truancy; provided, however, that such impairment must be clearly attributable to the unwillingness or inability of the respondent to exercise a minimum degree of care toward the child.”).

<sup>52</sup> KIERAN O’HAGAN, EMOTIONAL AND PSYCHOLOGICAL ABUSE OF CHILDREN 33 (1993).

<sup>53</sup> Gerald H. Katzman, *A Bioethical Analysis of a Form of Psychological Abuse: Teaching Hatred to Children*, 44 CLINICAL PEDIATRICS 143, 147 (2005).

<sup>54</sup> See, e.g., Martin H. Teicher, *Wounds That Time Won’t Heal: The Neurobiology of Child Abuse*, 2 CEREBRUM 50 (2000) (summarizing research performed on humans and animals that suggest early psychological abuse causes irreversible changes in the brain).

<sup>55</sup> Steinberg, Brooks & Remtulla, *supra* note 40, at 980.

<sup>56</sup> Jo Goodey, *Understanding Racism and Masculinity: Drawing on Research with Boys Aged Eight to Sixteen*, 26 INT’L J. SOC. OF L. 393 (1998) (analyzing racist aggression in young males as a social construct of masculinity).

<sup>57</sup> Huntington, *supra* note 26 (cataloging child welfare rights and proposing a problem-solving based approach to child welfare).

<sup>58</sup> See e.g., GA. DEPT. OF HUM. RESOURCES, DIVISION OF FAM. & CHILD. SERVICES, <http://dfcs.dhr.georgia.gov> (last visited May 16, 2007) (providing parent education and referrals to counselors to families of abused children who remain in the home); N.Y. STATE, OFF. OF CHILD. & FAM. SERVICES, <http://www.ocfs.state.ny.us> (last visited May 16, 2007) (providing parenting advice through home visitation to expectant mothers and new parents).

<sup>59</sup> Huntington, *supra* note 26, at 627.

<sup>60</sup> James G. Dwyer, *The Children We Abandon: Religious Exemptions to Child Welfare and Education Laws as Denials of Equal Protection to Children of Religious Objectors*, 74 N.C. L. REV. 1321, 1353-54 (1996) (arguing that children whose parents religiously object to vaccinations are denied protection from serious diseases). The most common statutory requirement is that parents have their children vaccinated before attending any school. *Id.* at 1356-57. See also Walter Wadlington, *David C. Baum Memorial Lecture: Medical Decision Making For and By Children: Tensions Between Parent, State, and Child*, 1994 U. ILL. L. REV. 311 (1994).

<sup>61</sup> The downside to preventing teaching hate speech within the existing framework is that doing so may have a disproportionate impact on minorities, single mothers, and divorced families. See e.g., DOROTHY ROBERTS, SHATTERED BONDS: THE COLOR OF CHILD WELFARE, at vii (2002) (discussing systematic bias and overrepresentation of African-American children in the child-welfare system); Huntington, *supra* note 26, at 657 n.106 (summarizing the scholarly debate on the causes of overrepresentation of African-Americans in the child-welfare system); Naomi Cahn, *Race, Poverty, History, Adoption, and Child Abuse: Connections*, 36 LAW & SOC’Y REV. 461 (2002) (attributing the overrepresentation of African-American children in the child-welfare system to poverty).

<sup>62</sup> Barbara Bennett Woodhouse, *Ecogenerism: An Environmentalist Approach to Protecting Endangered Children*, 12 VA. J. SOC. POL’Y & L. 409, 423 (2005) [hereinafter *Ecogenerism*] (rejecting the traditional approach to child welfare policy arguing for an ecological approach to child welfare).

<sup>63</sup> E.g., Reimann v. Reimann, 39 N.Y.S.2d 485, 485 (1942) (denying custody to father for his connections to Nazism); McCorvey v. McCorvey, 916 So.2d 357, 367 (2005) (ordering both parents to refrain from using racial slurs in the presence of the child).

<sup>64</sup> In Re Bianca W.F., 1999 Conn. Super. LEXIS 1807 (Conn. Super. Ct. July 12, 1999).

<sup>65</sup> *Id.* at \*9. Importantly, though, the original custody decision was made based on physical abuse. *Id.* at 4.

<sup>66</sup> McCorvey, 916 So.2d at 367.

<sup>67</sup> E.g., Eugene Volokh, *Parent-Child Speech and Child Custody Speech Restrictions*, 81 N.Y.U. L. REV. 631 (2006).

<sup>68</sup> *Id.* at 649.

<sup>69</sup> Perhaps little attention is paid because family law decisions often go unpublished.

<sup>70</sup> The relationship between parent, child, and State is commonly illustrated as a triangle, with the State at the apex, and child and parent on opposing ends of the base. Woodhouse, *Ecogenerism*, *supra* note 62, at 422 (rejecting the triangle approach and arguing for an ecological approach to child welfare); Huntington, *supra* note 26, at 642 (rejecting the triangle approach). Other scholars have illustrated the relationship as an inverted triangle, with the child represented at the bottom point of the triangle and the parents and the State at the top two points, thus demonstrating the authority of both the State and parents over the child. See Rosenbury, *supra* note 33.

<sup>71</sup> Rebecca M. Stahl, “Don’t Forget About Me”: Implementing Article 12 of the United Nations Convention on the Rights of the Child, 24 ARIZ. J. INT’L & COMP. L. 803, 816 (2007) (pointing out that the right of parents to raise their children without state interference is not only historical, but internationally recognized as well).

<sup>72</sup> Parnham v. J.R., 442 U.S. 584, 602 (1979).

<sup>73</sup> Prince v. Massachusetts, 321 U.S. 158, 168 (1944).

<sup>74</sup> *Id.* at 173.

<sup>75</sup> The Supreme Court has also upheld statutes that restrict a minor’s right to an abortion by requiring parental consent or notification. Bellotti v. Baird, 443 U.S. 622 (1979) (finding parental consent statute unconstitutional, but noting that a State can require parental consent for an unmarried minor’s abortion if the statute provides for an adequate judicial bypass). See also Planned Parenthood v. Ashcroft, 462 U.S. 476 (1983) (upholding an abortion statute that required parental consent for minors, but provided a judicial bypass option); Ohio v. Akron Center for Reproductive Health, 497 U.S. 502 (1990) (upholding a statute that made it a crime to perform an abortion on a minor unless the physician personally informed one of the parents). The Court has also upheld a statute that requires a minor to provide parental notification, while striking down a different provision in the same statute that required an adult to provide spousal notification. Planned Parenthood v. Casey, 505 U.S. 833 (1992). See also Katz, *supra* note 23.

<sup>76</sup> Amitai Etzioni, *On Protecting Children from Speech*, 79 CHI.-KENT L. REV. 3, 46 (2004) (quoting Michael S. Wald, *Children’s Rights: A Framework for Analysis*, 12 U.C. DAVIS L. REV. 255, 274 (1979)).

<sup>77</sup> Every state except Mississippi requires parental consent to marry unless the parties are at least eighteen years old. E.g., CAL. FAMILY CODE §§ 302 (Supp. 2007), GA. CODE ANN. § 19-3-2, N.Y. DOM. REL. § 14-2-7.

<sup>78</sup> E.g., GA. CODE ANN. § 16-6-3 (sexual intercourse with someone under the age of sixteen is a crime), ARIZ. REV. STAT. § 13-1405 (sexual intercourse with someone under the age of eighteen is a crime).

<sup>79</sup> Katz, *supra* note 23, at 1128-29.

<sup>80</sup> *Id.*

<sup>81</sup> James G. Dwyer, *Parents’ Religion and Children’s Welfare: Debunking the Doctrine of Parents’ Rights*, 82 CAL. L. REV. 1371, 1372-73 (1994) [hereinafter *Parents’ Religion*].

<sup>82</sup> Barbara Bennett Woodhouse, “Who Owns the Child?”: Meyer and Pierce and the Child as Property, 33 WM. & MARY L. REV. 995, 1114 (1992) (arguing that a child has become a “conduit for the parents’ religious expression, cultural identity, and class aspirations”); Dwyer, *Parents’ Religion*, *supra* note 81, at 1372-73 (arguing that parents should not have a right to control the upbringing of their children).

<sup>83</sup> Parnham v. J.R., 442 U.S. 584, 602 (1979) (discussing the historical significance of the family unit and broad parental authority). See Dwyer, *Parents’ Religion*, *supra* note 81, at 1424 (criticizing the reliance on tradition as a justification for parental primacy).

<sup>84</sup> But see Christine Ryan, *Revisiting the Legal Standards that Govern Requests to Sterilize Profoundly Incompetent Children: In Light of the “Ashley Treatment,” Is a New Standard Appropriate?*, 77 FORDHAM L. REV. 287, 299-301 (2008) (asserting that even though parents have a fundamental right to raise their children, even this right has its limitations, mainly for the protection of the child).

<sup>85</sup> Meyer v. Nebraska, 262 U.S. 390 (1923).

<sup>86</sup> Pierce v. Soc’y of Sisters, 268 U.S. 510 (1925). The early cases were decided during the Lochner era, a period characterized by expansive protection of economic liberties. Thus, the early cases were not decided purely on parental rights grounds; they were also decided on the grounds of economic liberty. The Court, however, has never repudiated the right of the parent to control the upbringing of her child. Troxel v. Granville, 530 U.S. 57, 92 (2000) (Scalia, J., dissenting).

<sup>87</sup> Meyer, 262 U.S. at 401.

<sup>88</sup> *Id.*

<sup>89</sup> *Id.* at 396-97.

<sup>90</sup> *Id.* at 401.



<sup>91</sup> “The protection of the Constitution extends to all, to those who speak other languages as well as to those born with English on the tongue.” *Id.*

<sup>92</sup> *Id.*

<sup>93</sup> *Id.*

<sup>94</sup> *Pierce v. Soc’y of Sisters*, 268 U.S. 510, 530 (1925).

<sup>95</sup> *Id.*

<sup>96</sup> *Id.* at 513.

<sup>97</sup> *Id.* at 536.

<sup>98</sup> *Id.* at 534.

<sup>99</sup> *Id.* at 535. The Court noted that the appellees in this case were not parents but corporations, and thus Fourteenth Amendment liberty guarantees were not implicated. The case was decided under the threatened loss of property that the schools would endure under the Act. *Id.* at 536. Appellees asked protection against arbitrary, unreasonable, and unlawful interference with their patrons and the consequent destruction of their business and property. *Pierce*, 268 U.S. at 535.

<sup>100</sup> *Pierce*, 268 U.S. at 535.

<sup>101</sup> See generally, *Wisconsin v. Yoder*, 406 U.S. 205 (1972).

<sup>102</sup> *Troxel v. Granville*, 530 U.S. 57, 65 (2000). The Washington law permitted “[a]ny person” to petition for visitation rights “at any time” and authorize[d] state superior courts to grant such rights whenever visitation may serve a child’s best interests.” *Id.* In this case, a mother limited her children’s visitation with their grandparents to once a month. *Id.* The grandparents sued for visitation rights under the statute. *Id.* The superior court ordered visitation one weekend per month, one week during the summer, and four hours on each of the grandparents’ birthdays. *Id.* at 61.

<sup>103</sup> *Id.* at 67.

<sup>104</sup> *Troxel*, 530 U.S. at 65.

<sup>105</sup> The Court held that the Washington statute unconstitutionally infringed on a parent’s constitutional right because the statute was “breathhtakingly broad” in that it allowed any person to petition for visitation rights at any time and allowed the court to grant such visitation whenever the court deemed it in the best interest of the child. *Id.* at 67.

<sup>106</sup> The statute did not instruct the court to presume that the parent’s choice was in the best interest of the child, and thus the State court could essentially overturn any decision by a fit custodial parent based solely on the judge’s determination of the child’s best interest. *Id.*

<sup>107</sup> *Id.* at 68-69. The burden is on the State or grandparent to disprove the presumption. *Id.*

<sup>108</sup> *Parnham v. J.R.*, 442 U.S. 584, 603 (1979) (“Nonetheless, we have recognized that a State is not without constitutional control over parental discretion in dealing with children when their physical or mental health is jeopardized.”).

<sup>109</sup> *Prince v. Massachusetts*, 321 U.S. 158 (1944).

<sup>110</sup> *Id.* at 160-61. The statute in this case prohibited children to work selling newspapers or other articles on the street. *Id.* Prince argued that the statute unconstitutionally violated the child’s First Amendment right to practice her religion and the aunt’s Fourteenth Amendment right to control the upbringing of the child. *Id.* at 164.

<sup>111</sup> *Id.* at 161.

<sup>112</sup> *Id.* at 162.

<sup>113</sup> *Id.* at 166.

<sup>114</sup> *Id.* at 167 (“[T]he [S]tate has a wide range of power for limiting parental freedom and authority in things affecting the child’s welfare; and that this includes, to some extent, matters of conscience and religious conviction.”).

<sup>115</sup> Colin M. Macleod, *A Liberal Theory of Freedom of Expression For Children*, 79 CHI.-KENT L. REV. 55, 69 (2004) (integrating a liberal theory of the Constitution with the promotion of children’s rights).

<sup>116</sup> William Galston, *When Well-Being Trumps Liberty: Political Theory, Jurisprudence, and Children’s Rights*, 79 CHI.-KENT L. REV. 279, 281 (2004) (“If children are treated as mini-adults, the law puts them at risk by failing to recognize their distinctive needs, vulnerabilities and dependencies. On the other hand, if adults are treated as overgrown children, the law slips into an unwarranted paternalism that is at best condescending and at worst tyrannical.”).

<sup>117</sup> Macleod, *supra* note 115, at 69.

<sup>118</sup> Joel Feinberg, *The Child’s Right to an Open Future*, in WHOSE CHILD?: CHILDREN’S RIGHTS, PARENTAL AUTHORITY, AND STATE POWER 124, 125 (William Aiken & Hugh LaFollette eds., 1980). “Rights in trust” are “rights given to the child, but held in trust for the person of the adult she will become.” *Id.*

<sup>119</sup> Macleod, *supra* note 115, at 72-73.

<sup>120</sup> Laura Leets, *Responses to Internet Hate Sites: Is Speech too Free in Cyberspace?*, 6 COMM. L. & POL’Y 287, 315 (2001) (mentioning that racist indoctrina-

tion develops a set of beliefs, which over time may manifest as “moral exclusion and subsequent crimes against humanity”).

<sup>121</sup> See discussion *infra* Part II.B.

<sup>122</sup> Macleod, *supra* note 115, at 71.

<sup>123</sup> David Archard, *Free Speech and Children’s Interests*, 79 CHI.-KENT L. REV. 83, 87 (2004)

(“[T]he most important [right given to a child] is a child’s right to . . . the maximal possible range of subsequent autonomous choices as an adult.”) (citing Feinberg, *supra* note 118, at 124-27).

<sup>124</sup> Macleod, *supra* note 115, at 69.

<sup>125</sup> Kevin W. Saunders, *The Need for a Two (Or More) Tiered First Amendment to Provide for the Protection of Children*, 79 CHI.-KENT L. REV. 257, 267-69 (2004).

<sup>126</sup> *Id.* at 268 (noting racist hate music by groups such as Aggravated Assault, Nordic Thunder, Angry Aryans, Brutal Attack, RaHoWa (which stands for Racial Holy War), and racist video games such as Ethnic Cleansing).

<sup>127</sup> *Id.* at 269 (“The free expression rights of adults should not include the right to reach an audience of other people’s children.”) “There is the danger that government could use the right to limit the expression of nonparents to children to impose orthodoxy on the next generation. To prevent such an imposition, it is important to recognize the right of parents to provide their children with material that society may feel unsuitable.” *Id.* at 273. “Parents must be allowed to disagree with the State and purchase and provide the material to their children themselves.” *Id.* at 276.

<sup>128</sup> *Ginsberg v. New York*, 390 U.S. 629 (1968).

<sup>129</sup> *Id.* at 640-41.

<sup>130</sup> *A parens patriae* is a parent in the last instance, whereas the parent in the first instance is the natural parent or guardian. This means that the State can only act on this interest when “there is a clear failure” by the parents in the first instance. *Id.*

<sup>131</sup> See Etzioni, *supra* note 76, at 7.

<sup>132</sup> *FCC v. Pacifica Foundation*, 438 U.S. 726 (1978).

<sup>133</sup> See JOHN MILTON, *Areopagitica*, in COMPLETE POEMS AND MAJOR PROSE (Meritt Y. Hughes ed., Odyssey Press 1957) (1644).

<sup>134</sup> *Abrams v. U.S.*, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting).

<sup>135</sup> *Id.*

<sup>136</sup> JOHN STUART MILL, *Of the Liberty of Thought and Discussion*, Ch. 2, in ON LIBERTY (1959).

<sup>137</sup> C. Edwin Baker, *Scope of the First Amendment Freedom of Speech*, 25 UCLA L. REV. 964, 965 (1977-1978).

<sup>138</sup> See FISS, *supra* note 7, at 23 (criticizing the fight-speech-with-more-speech justification).

<sup>139</sup> See Delgado & Yun, *supra* note 19, at 1822 (arguing that the marketplace of ideas is unfair in the context of racist hate speech).

<sup>140</sup> Baker, *supra* note 137, at 965; see Delgado & Yun, *supra* note 19, at 1822; MACKINNON, *supra* note 9, at 78-80 (“Speech . . . belongs to those who own it, mainly big corporations . . . The resulting law of libel has had the effect of licensing the dominant to say virtually anything about subordinate groups with impunity while supporting the media’s power to refuse access to speech to the powerless, as it can always cite fear of a libel suit by an offended powerful individual.”).

<sup>141</sup> See Lawrence, *supra* note 19, at 803.

<sup>142</sup> Saunders, *supra* note 125, at 272.

<sup>143</sup> *Id.*

<sup>144</sup> Steinberg, Brooks & Remtulla, *supra* note 40, at 984.

<sup>145</sup> MACKINNON, *supra* note 9, at 78.

<sup>146</sup> Kent Greenawalt, *Free Speech Justifications*, 89 COLUM. L. REV. 119, 142 (1989).

<sup>147</sup> Volokh, *supra* note 67, at 681.

<sup>148</sup> Alexander Meiklejohn, *The First Amendment is an Absolute*, 1961 SUP. CT. REV. 245, 255 (1961).

<sup>149</sup> *Id.*

<sup>150</sup> These arguments are characterized here as non-instrumental, but also serve the instrumental function of promoting community character. See Bollinger, *supra* note 15, at 984.

<sup>151</sup> *Id.* Catharine MacKinnon criticizes this justification. See MACKINNON, *supra* note 9, at 78 (“This has become the ‘speech you hate’ test: the more you disagree with content, the more important it becomes to protect. You can tell you are being principled by the degree to which you abhor what you allow.”).

<sup>152</sup> Bollinger, *supra* note 15, at 984.

<sup>153</sup> See GATES, *supra* note 9, at 40. See also *Ginsberg v. New York*, 390 U.S. 629, 642-43, n.10 (1968) (“[A] child might not be as well prepared as an adult to make an intelligent choice. . . The child is protected in his reading of pornogra-

phy by the knowledge that it is pornographic, *i.e.*, disapproved. It is outside of parental standards and not a part of his identification processes. To openly permit implies parental approval and even suggests seductive encouragement. If this is so of parental approval, it is equally so of societal approval—another potent influence on the developing ego.”).

<sup>154</sup> GATES, *supra* note 9, at 20-21.

<sup>155</sup> *Id.* at 21.

<sup>156</sup> *Id.* (“[T]he expansive First Amendment that people either celebrate or bemoan is really only a few decades old. And even the Court’s most expansive interpretation of First Amendment protection has always come with a list of exceptions.”).

<sup>157</sup> Police Dep’t of Chicago v. Mosley, 408 U.S. 92, 95-96 (1972). *See also* R.A.V. v. City of St. Paul, 505 U.S. 377, 382 (1992) (“Content-based regulations are presumptively invalid.”).

<sup>158</sup> Hill v. Colorado, 530 U.S. 703, 741 (2000) (Scalia, J., dissenting) (arguing that the statute is content-based).

<sup>159</sup> Cent. Hudson Gas & Electric Corp. v. Public Serv. Comm’n, 477 U.S. 557, 563 (1980) (stating that the Constitution accords less protection to commercial speech).

<sup>160</sup> Mills v. Alabama, 384 U.S. 214, 218 (1966).

<sup>161</sup> *Id.* at 218-19.

<sup>162</sup> Roth v. U.S., 354 U.S. 476 (1979) (holding that obscenity is not protected by the Constitution). *See also* Miller v. California, 413 U.S. 15 (1973) (articulating a test to determine whether expression is obscene).

<sup>163</sup> Central Hudson, 477 U.S. at 566 (articulating intermediate scrutiny test for commercial speech).

<sup>164</sup> R.A.V. v. City of St. Paul, 505 U.S. 377 (1992).

<sup>165</sup> The term “freedom from speech” is derived from Franklyn S. Hamlin’s, *Speech v. Privacy: Is There a Right Not to be Spoken To?*, 67 NW. U. L. REV. 123, 123 (1972) (“[T]he increasing extent to which speech has become militant and abrasive has led its sometimes reluctant hearers to yearn for ‘freedom from speech’ rather than ‘freedom of speech.’”).

<sup>166</sup> Ginsberg v. New York, 390 U.S. 629, 649-50 (1968) (Stewart, J., concurring).

<sup>167</sup> The doctrine has been recognized by the Supreme Court for at least fifty years. Marcy Strauss, *Redefining the Captive Audience Doctrine*, 19 HASTINGS CONST. L.Q. 85, 85 (1991) [hereinafter *Redefining*]. *See* Kovacs v. Cooper, 336 U.S. 77, 86-87 (1949) (“The unwilling listener is not like the passer-by who may be offered a pamphlet in the street but cannot be made to take it. In his home or on the street he is practically helpless to escape this interference with his privacy by loud speakers except through the protection of the municipality.”).

<sup>168</sup> 336 U.S. at 86-87. *See generally* Lehman v. City of Shaker Heights, 418 U.S. 298 (1974).

<sup>169</sup> Strauss, *Redefining*, *supra* note 167, at 85.

<sup>170</sup> *See id.* at 86.

<sup>171</sup> *See id.* Robert D. Nauman, *The Captive Audience Doctrine and Floating Buffer Zones: An Analysis of Hill v. Colorado*, 30 CAP. U. L. REV. 769, 777 (2002) (“The . . . truth is that in our pluralistic society, constantly proliferating new and ingenious forms of expression, ‘we are inescapably captive audiences for many purposes.’”).

<sup>172</sup> *See* Strauss, *Redefining*, *supra* note 167, at 86 (“Courts routinely invoke the talismanic phrase ‘the right to be let alone,’ as though these words explain all. Rarely do judges explain what this right means, or why it is valued.”).

<sup>173</sup> Several commentators have discussed the vagaries of the captive audience doctrine. *See id.* at 90 (discussing the likelihood that the Court finds an audience captive when in the home rather than outside of it and when speech is spoken rather than written, and proposing an alternative balancing test that weighs the privacy interests of the hearer with the speech interests of the speaker); J.M. Balkin, *Free Speech and Hostile Environments*, 99 COLUM. L. REV. 2295 (1999); Daniel E. Hartstein, Comment, *Collateral Censorship and First Amendment Theory*, 8 U. PA. J. LAB. & EMP. L. 765 (2006) (arguing that “unwillingness” of the listener is the common thread among captive audience cases); Nauman, *supra* note 171, at 780 (“It appears that the opinions of several commentators as to the Court’s ‘schizophrenia’ in applying the doctrine may have been in fact confirmed.”).

<sup>174</sup> Hill v. Colorado, 530 U.S. 703, 716 (2000) (applying the captive audience doctrine to uphold a statute that prohibited anyone from protesting 100 feet from the entrance of a health care facility or eight feet from any person without that

person’s consent). *But see* Cohen v. California, 403 U.S. 15 (1971) (rejecting the captive audience doctrine and finding a conviction for wearing a jacket that said “Fuck the Draft” in a courthouse unconstitutional); Erznosnik v. City of Jacksonville, 422 U.S. 205 (1971) (striking down an ordinance that prohibited drive-ins from showing nudity if screens were visible from the public street).

<sup>175</sup> FCC v. Pacifica, 438 U.S. 726 (1978) (applying the doctrine to uphold FCC fines for offensive daytime radio broadcasts). *Pacifica* is an interesting case in that it applies the captive audience doctrine to listeners at home or in a car who could very easily turn off the radio to avoid the offensive speech.

<sup>176</sup> Frisby v. Schultz, 487 U.S. 474 (1988) (applying the doctrine to uphold ordinances that prohibit focused residential picketing).

<sup>177</sup> *E.g.*, Rowan v. U.S. Post Office Dep’t, 397 U.S. 728 (1970) (upholding postal provisions allowing residents to block sexually oriented mailings); Breard v. Alexandria, 341 U.S. 622 (1951) (upholding a statute that prohibited commercial door-to-door solicitation without prior consent of the homeowner). *But see* Bolger v. Youngs Drugs Products Corp., 463 U.S. 60 (1983) (striking down statute prohibiting unsolicited mailings of contraceptive advertisements); Consol. Edison Co. v. Public Service Comm’n, 447 U.S. 530 (1980) (nuclear power advertisements); Lamont v. Postmaster Gen., 381 U.S. 301 (1965) (communist propaganda); Martin v. Struthers, 319 U.S. 141 (1943) (unwanted door-to-door solicitation).

<sup>178</sup> Lehman v. City of Shaker Heights, 418 U.S. 298 (1974).

<sup>179</sup> *E.g.*, Balkin, *supra* note 173, at 2307 (proposing practical captivity rather than necessary captivity as the basis for finding the workplace a paradigm instance of First Amendment captivity); Strauss, *Redefining*, *supra* note 167; Marcy Strauss, *Sexist Speech in the Workplace*, 25 HARV. C.R.-C.L. L.REV. 1 (1990); J.M. Balkin, *Some Realism about Pluralism: Legal Realist Approaches to the First Amendment*, 1990 DUKE L.J. 375 (1990); Robinson v. Jacksonville Shipyards, Inc., 760 F.Supp. 1486, 1535 (N.D. Fla. 1991).

<sup>180</sup> *See* Hill v. Colorado, 530 U.S. 703, 716-17 (2000) (“The unwilling listener’s interest in avoiding unwanted communication has been repeatedly identified in our cases. It is an aspect of the broader ‘right to be let alone’ that one of our wisest Justices characterized as ‘the most comprehensive of rights and the right most valued by civilized men.’”); Rowan, 397 U.S. at 736 (“[T]he right of every person ‘to be let alone’ must be placed in the scales with the right of others to communicate.”); Strauss, *Redefining*, *supra* note 167, at 108 (noting that the right to be let alone as applied to unwanted speech is a “vague but rhetorically powerful concept”).

<sup>181</sup> Strauss, *Redefining*, *supra* note 167, at 107.

<sup>182</sup> While the concept of autonomy is difficult to define precisely, it encompasses notions of meaningful choice and free will. Autonomy as a defense to protecting hate speech is much debated. The proponents of regulating hate speech have argued that free expression should be analyzed under an agency concept, which rejects individual autonomy and redefines the “self” in relational and social terms. *See* Demaske, *supra* note 12, at 277.

<sup>183</sup> Strauss, *Redefining*, *supra* note 167, at 110.

<sup>184</sup> *See* Hill, 530 U.S. at 716 (“The right to free speech . . . includes the right to attempt to persuade others to change their views . . . [b]ut the protection afforded to offensive messages does not always embrace offensive speech that is so intrusive that the unwilling audience cannot avoid it.”) (quoting Frisby v. Schultz, 487 U.S. 474, 487 (1988)).

<sup>185</sup> Strauss, *Redefining*, *supra* note 167, at 110. *But see* Hill, 530 U.S. at 753 (Scalia, J., dissenting) (“[T]he Court today elevates the abortion clinic to the status of the home.”). Not surprisingly, the captive audience doctrine’s connection with the home has been used to support the constitutionality of hate-speech codes on college campuses. To a college student, her dormitory is her home, and racist slurs written on a board outside of her room are akin to focused residential picketing. *See* Matsuda, *supra* note 16.

<sup>186</sup> Social science research should be used to determine the age.

<sup>187</sup> Woodhouse, *Ecogenerism*, *supra* note 62, at 433.

<sup>188</sup> *Id.*

<sup>189</sup> *See* Lehman v. City of Shaker Heights, 418 U.S. 298 (1974).

<sup>190</sup> Other scholars, notably Mari Matsuda, have argued that the captive audience doctrine is applicable to campus-hate speech because “[l]iving on or near campus, studying in the library and interacting with fellow students are integral parts of university life.” Matsuda, *supra* note 16, at 2372.

# THE RELIGIOUS FREEDOM RESTORATION ACT AND PROTECTION OF NATIVE AMERICAN RELIGIOUS PRACTICES

By  
Jason Gubi\*

## INTRODUCTION

While there has been debate as to what the religion clauses protect, nearly all observers would agree that the First Amendment prohibits the federal government from establishing a national religion.<sup>1</sup> Yet, from 1882 to 1932, the federal government subsidized the conversion of Native Americans to Christianity, while simultaneously banning Native American spiritual practices.<sup>2</sup>

Moreover, courts have treated Native American religions differently from “mainstream”<sup>3</sup> Judeo-Christian religions for much of this nation’s history. Beginning with *Johnson v. M’Intosh*, the Supreme Court noted that the “character and religion” of the Native Americans stood in stark contrast to the “superior genius of Europe,” helping to justify European control of the land.<sup>4</sup> In exchange, the Europeans gave the Native Americans civilization and Christianity, believing this to be “ample compensation.”<sup>5</sup> *M’Intosh*’s view of the Native American religions as being somehow inferior to those of Western Europe thus informs the Court’s subsequent unbalanced treatment of Native Americans in Free Exercise Clause jurisprudence.

This article will discuss the extent to which the Free Exercise Clause creates rights to freely exercise religion for Native Americans in comparison with adherents of mainstream religions and the effects, if any, the Religious Freedom Restoration Act (“RFRA”) has had on such rights.<sup>6</sup> Section II of this article examines the law governing Native American land use, including the First Amendment, the American Indian Religious Freedom Act (“AIRFA”), and the RFRA. Section III illustrates some key issues arising in Free Exercise Clause jurisprudence cases: (a) how central an asserted right must be for the courts to recognize that the right must be protected from government action; (b) how substantial a burden on religion must be to be protected under RFRA; and (c) what constitutes a compelling government interest. Section IV reviews Free Exercise Clause jurisprudence in general, with an emphasis on Native American Free Exercise Clause jurisprudence, to illustrate the difference in application of the clause to mainstream religions as opposed to Native American religions. Section V analyzes and predicts the manner in which Native American religious freedoms are protected, positing that although the law has historically provided little protection for Native American religions, courts may now be more receptive to securing Native American religious freedoms under RFRA.

## THE LAW GOVERNING RELIGIOUS FREEDOM

The free exercise of religion in the United States is secured first and foremost by the Bill of Rights. The First Amendment states that “Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof ...”<sup>7</sup> Taken together, the Establishment and Free Exercise

clauses prohibit the government from establishing a state religion and prevent the government from unduly restricting the exercise of religious freedoms.

Congress has also passed statutes to effectuate the purposes of the First Amendment with regard to religion. The AIRFA protects Native Americans’ rights to “believe, express, and exercise” their traditional religions, “including but not limited to access to sites, use and possession of sacred objects, and the freedom to worship through ceremonials and traditional rites.”<sup>8</sup> The AIRFA initially offered only weak protection, however, and Congress had to amend the law in response to a landmark Supreme Court case concerning religious use of peyote.

In *Employment Division v. Smith* the Supreme Court upheld a statute barring the use of peyote even for religious reasons.<sup>9</sup> The Court found that neutral, generally applicable laws could be applied to religious practices even when they substantially burden the free exercise of religion and were not supported by a compelling government interest. In response to *Smith*, Congress amended the AIRFA to allow the use of peyote in religious rituals<sup>10</sup> and passed the RFRA.<sup>11</sup>

The RFRA prohibits the government from substantially burdening the free exercise of religion unless it can show a compelling interest, and accomplish its ends through the least restrictive means possible.<sup>12</sup> Although the RFRA was found unconstitutional as applied to the states,<sup>13</sup> it has been found constitutional as applied to the federal government.<sup>14</sup>

## GOVERNING PRINCIPLES OF JUDICIAL APPLICATION OF THE RFRA

To determine whether the RFRA protects a right the courts consider several key interests such as: (a) the central nature of the asserted right; (b) whether the burden on religion is substantial; and (c) what constitutes a compelling government interest. Courts sometimes analyze the centrality of an infringed practice in determining the constitutionality of the governmental action. RFRA defines exercise of religion as “any exercise of religion, whether or not compelled by, or central to, a system of religious belief.”<sup>15</sup> Section IV of this article, addresses the extent to which a given religious practice must be central to trigger protection under the Free Exercise Clause or RFRA frameworks.

The RFRA only protects religious practices that are substantially burdened by governmental action.<sup>16</sup> Some of the approaches courts have taken to analyze the substantiality of the burden are: (a) making a case specific determination;<sup>17</sup> (b) requiring coercion of a religious adherent;<sup>18</sup> (c) assuming sufficiency of the asserted burden;<sup>19</sup> and (d) requiring that an individual be prevented from engaging in religious conduct or having a religious experience.<sup>20</sup>

Only compelling governmental interests can infringe the free exercise of religion. The Supreme Court defines compelling interests as interests of “the highest order and not otherwise served.”<sup>21</sup> Maintaining a uniform tax code,<sup>22</sup> preserving

Native American culture,<sup>23</sup> protecting bald and golden eagles,<sup>24</sup> and enforcing participation in the social security system<sup>25</sup> are examples of compelling governmental interests.

## FREE EXERCISE CLAUSE JURISPRUDENCE

This section will compare how courts have analyzed Free Exercise claims in a number of different scenarios, highlighting the differences between the treatment received by adherents of Native American and mainstream religions.

### GOVERNMENTAL BENEFITS

In *Sherbert v. Verner*, the Supreme Court considered the constitutionality of a South Carolina unemployment benefits scheme which exempted people from benefits if they were able to work but chose not to work.<sup>26</sup> This scheme benefited Sunday worshippers while indirectly burdening the free exercise of religion of non-Sunday Sabbath-worshippers. The Court, therefore, established a burden switching, or compelling burden test.<sup>27</sup> For an action to be constitutional, the government must prove that it has a compelling interest in the regulation or action and that the means of achieving this interest are the least restrictive possible.<sup>28</sup> Under this test, the Court noted that non-Sunday worshippers were forced to choose between taking the unemployment benefits and observing their religion.<sup>29</sup> The Court found such a choice repugnant under the Free Exercise Clause as an undue burden on religious freedom.<sup>30</sup>

In *Bowen v. Roy*, the Court declined to apply the burden switching test that it had used in *Sherbert*.<sup>31</sup> Native American recipients of welfare benefits, on behalf of their minor child, objected to a government policy requiring the parents to submit the child's social security number in order to receive benefits. The child's father believed that the use of an arbitrary number as a means of identification contradicted his religious convictions, as it cut against an individual's uniqueness.<sup>32</sup> Though the Court recognized that the test applied in cases like *Sherbert* would seem to be applicable because an ostensibly neutral governmental policy was creating a burden on the free exercise of religious practice, it declined to do so.

In *Bowen*, the court found a lesser burden upon a religious practice, and a higher governmental interest in enacting the regulation.<sup>33</sup> The Court distinguished government regulations that only "call[] for a choice between securing a governmental benefit and adhering to a religious belief[]...from governmental action or legislation that criminalizes religiously inspired activity or inescapably compels conduct that some find objectionable for religious reasons."<sup>34</sup> Moreover, the Court reasoned that the *Sherbert* ruling may be viewed "as a protection against unequal treatment rather than a grant of favored treatment for the members of the religious sect."<sup>35</sup> Therefore, while the *Sherbert* test was appropriate in cases involving unequal treatment,<sup>36</sup> there was no need for a more stringent test in *Bowen*.

*The Court appears to favor Judeo-Christian beliefs in determining whether or not to apply the Sherbert test.*

While the Court distinguished *Bowen* from *Sherbert*, both instances involved a religious adherent who had to choose

between following his religion and receiving a government benefit. The *Bowen* Court did not analyze the centrality of the infringed religious practice. It noted, however, that while the governmental interest was compelling, the religious practice was not substantially infringed. In finding that the burden imposed on the Native American family was minor, the Court thus implicitly regards that choosing to obey a Sabbath is more important than a religious belief in an individual's uniqueness.

### GOVERNMENTAL REGULATIONS THAT THREATEN THE EXISTENCE OF A PARTICULAR RELIGION.

The following cases illustrate the Court's treatment of governmental practices that are neutral on their face, but indirectly threaten the entire existence of religious practices.

In *Wisconsin v. Yoder*, Wisconsin's compulsory schooling law forced Amish parents to send their children to public school after the eighth grade violating core Amish religious beliefs.<sup>37</sup> Although this law was a neutral government regulation, the Court applied the *Sherbert* test to find that Wisconsin's law would debilitate the continuance of the Amish faith and therefore unduly burden the free exercise of religion.<sup>38</sup> The Court found that a regulation that is neutral in application may nonetheless "offend the constitutional requirement for governmental neutrality if it unduly burdens the free exercise of religion."<sup>39</sup> In *Yoder*, the neutral regulation ran afoul of the Free Exercise Clause because its neutral application would have the effect of debilitating the continuance of the Amish faith. The Court thus expanded the scope of protection of the Free Exercise Clause.

In *Lyng v. Northwest Cemetery Protective Association*, the government proposed the construction of a six-mile road cutting through a National Forest in northwestern California.<sup>40</sup> Though the Forest Service's expert was against building the road because the area was viewed as indispensable<sup>41</sup> to the religious practices of three Native American tribes, the Forest Service rejected that recommendation.<sup>42</sup>

The tribes initially achieved some success in the lower courts.<sup>43</sup> The district court acknowledged the centrality of the infringed right to their religious practice<sup>44</sup> and issued an injunction.<sup>45</sup> On appeal, the Ninth Circuit affirmed the granting of the injunction, holding that the road construction did not further a compelling state interest and violated the tribes' free-exercise rights.<sup>46</sup>

The Supreme Court reversed, distinguishing *Lyng* from other cases where the indirect burden was found unconstitutional in that they involved governmental coercion, while concluding that *Lyng* did not.<sup>47</sup> The Court said the First Amendment does not involve what individuals can extract from the government; rather it involves what the government is prohibited from doing to the individual.<sup>48</sup> Even if the road would destroy the tribes' religion, the Court reasoned that because the governmental action did not "coerce" the tribes into violating their religious tenets, it did not sufficiently burden their religion.<sup>49</sup>

In rejecting the tribes' claim, the Court also stressed that the government has the prerogative to decide what to do with its own land.<sup>50</sup> It feared that recognizing the claim could give rise to religious servitudes on government property, thereby inhibiting the government's ability to advance the public interest.<sup>51</sup>

*The Free Exercise Clause did not protect Native Americans from a governmental action that*

*threatened a religious practice because of the government's interest in managing its land.*

The *Lyng* Court seemed to be holding that ostensibly neutral laws that eliminate Native American religious practices are constitutional so long as they are not an outright ban on the practicing of a religion. Both *Yoder* and *Lyng* involve government policies that risked the destruction of a religion, yet only in *Lyng* was the government action found to be constitutional.<sup>52</sup> The difference in the outcome of these cases resulted from the fact that the proposed action in *Lyng* involved government land.<sup>53</sup> Therefore, the *Lyng* case can be interpreted to mean that the First Amendment cannot be invoked to challenge the government's use of real property.<sup>54</sup>

Indeed, this interpretation of *Lyng* was expressed when the RFRA was passed in November 1993.<sup>55</sup>

RFRA calls for the application of Free Exercise analysis from before *Smith*, including cases such as *Lyng*, which refuse to extend judicial protection when government action on federal land is at issue.<sup>56</sup> Congress was thus not attempting to change the way the courts interpret cases that deal with governmental land management. Yet, an express aim of RFRA was to create a right of action for individuals suffering infringement of their right to freely exercise their religious beliefs as a result of indirect, ostensibly neutral, government action.<sup>57</sup> Therefore, RFRA creates a right of action for individuals privately owning land, but not when the federal government is managing federal land. Moreover, since Native American religious practice often occurs on federal land, such practices will be subject to greater infringement than those who practice their religion on their own property.<sup>58</sup>

In *Yoder*, a government policy that risked the destruction of a religion was found unconstitutional,<sup>59</sup> yet in *Lyng*, a government action that posed an even greater risk of this same result was found constitutional.<sup>60</sup> In *Lyng*, the centrality of the religious practice at issue was recognized by the district court and the substantiality of the burden was clear because experts believed the proposed action would damage an area viewed as indispensable to the religious practice of three Native American tribes.<sup>61</sup> However, because the proposed action was to occur on governmental land, it was allowed.<sup>62</sup>

#### **RELIGIOUS OBJECTS AND OBSERVANCES**

Case law has been inconsistent in its treatment of government regulations affecting the use of objects that are used for religious observances, but whose use is also regulated by a federal regulatory scheme. This inconsistency continues even after passage of the RFRA.

In *Employment Div. v. Smith*, the Supreme Court held that neutral statutes are not unconstitutional by virtue of impos-

ing an undue burden on the free exercise of religion so long as the law is otherwise valid and within the government's prerogative to regulate.<sup>63</sup> The *Smith* Court viewed accommodation of religious minorities as preferring one religion over another. This accommodation would create a constitutional right to ignore neutral laws of general applicability.<sup>64</sup> Therefore, the Court decided not to apply the compelling interest test that it had applied in cases such as *Sherbert* and *Yoder*.<sup>65</sup> Rather, a rational basis for the regulation was sufficient to pass constitutional muster.

In *Gonzales v. O Centro Espirita Beneficente Uniao Do Vegetal*, a small religious sect sought a preliminary injunction to prevent the federal government from enforcing a ban against using a hallucinogen regulated under the Controlled Substances Act.<sup>66</sup> The district court granted the injunction, and the Court of Appeals affirmed.<sup>67</sup>

The court applied the *Sherbert* test because the federal government was seeking to impose restrictions that burden religious practice.<sup>68</sup> Under this test, the Government failed to show that it had a compelling interest in not allowing an exception to the Controlled Substances Act. Neither the evidence related to diversion of the drug away from its religious use, nor the evidence as to its adverse health effects was strong.<sup>69</sup> The Supreme Court affirmed noting that RFRA expressly requires an individualized inquiry.<sup>70</sup> The Court also noted that the Controlled Substances Act does make an exception to hallucinogens such as peyote.<sup>71</sup>

The Tenth Circuit Court of Appeals in *U.S. v. Hardman* found that a governmental scheme aimed at restricting access to eagles' feathers violates individuals' Free Exercise rights because the regulatory scheme was not the least restrictive means possible to accomplish the government's compelling interest.<sup>72</sup> The regulatory scheme required a permit from the federal government to collect eagles' feathers.<sup>73</sup> Only members of federally-recognized tribes could apply for this permit.<sup>74</sup>

As a preliminary matter, the circuit court found that because an eagle's feather is sacred in many Native American religions, any scheme limiting access to feathers substantially burdened the free exercise of a religious belief.<sup>75</sup> In addition, the court also found that there was a compelling governmental interest to combat spurious claims for eagles' feathers and to protect Native American culture.<sup>76</sup> However, the government never showed the nexus between preservation of this culture and selectively allowing application for permits based on membership in federally-recognized tribes.<sup>77</sup> The court found that testimony in support of the notion that the prohibition would help to preserve Native American culture was equally indicative of a tendency to cause its destruction since the ineligibility of adherents to apply for a permit could just as easily lead to poaching as too long a waitlist.<sup>78</sup> As a result, the court found that the regulation was not the least restrictive way to preserve Native American Culture.<sup>79</sup>

In *United States v. Tawahongva*, the United States District Court for the District of Arizona found that a Native American's freedom to exercise his religion was not substantially burdened by the government's requirement that an individual seeking to acquire an eagle's feather apply for a permit.<sup>80</sup> The court admitted that the permit requirement substantially burdened the free exercise of Native American religion in other cases. However, rather than making a particularized inquiry as to whether the means of achieving the asserted governmental interest was

the least restrictive possible, the *Tawahongva* court merely inquired as to whether the defendant's burden was particularly burdensome.<sup>81</sup> The defendant only objected to the requirement to apply for a permit from the Hopi tribal government, and did not object to the need to apply for a permit in general. The court concluded that the burden was not substantial for him.<sup>82</sup> Even if the burden was substantial, the court nevertheless determined that the government has a compelling interest in regulating access to eagles' feathers and the means used to accomplish it were the least restrictive possible.

*Judicial interpretation of RFRA with regard to the use of religious objects and religious observances in the face of governmental regulatory schemes remains inconsistent.*

In *Smith*, the Court rejected using the balancing test from *Sherbert* and *Yoder* even though the regulation indirectly burdened religion. The Court questioned neither the centrality of the practice, nor the substantiality of the burden. Had the Court undertaken the *Sherbert* and *Yoder* analysis, it likely would have struck the government regulation for not being the least restrictive means of accomplishing a compelling interest.

Mainstream religions had for decades been protected from governmental infringement of religious practice via *Sherbert* and *Yoder's* analytical framework. Yet, the Court in *Smith* eschewed that analysis in consideration of a burden imposed upon a non-mainstream religion. After passage of the RFRA, the *O Centro* Court overturned the governmental action in a case factually similar to *Smith*. Thus, the RFRA can be understood to convey greater protection for the free exercise of religion than the Free Exercise Clause.

While the *Hardman* and *Tawahongva* courts both assumed that the infringed right was central enough to trigger an analysis under the Free Exercise clause, the two courts differed as to the substantiality of the burden imposed. This difference is likely due to the *Tawahongva* court's subjective inquiry on the substantiality of the burden for the defendant. Therefore, the *Tawahongva* court rejected the defendant's claim even while recognizing that the statute as generally applied substantially burdens the free exercise of religion.<sup>83</sup> This subjective RFRA inquiry involved greater scrutiny of the defendant's asserted injury than courts ordinarily undertake in Free Exercise cases.

The RFRA protected non-mainstream religions use of controlled substances for religious purposes. However, as in *Tawahongva*, Native American tribes are still unable to freely practice their religion as mainstream religions are.

**CONFLICTS BETWEEN GOVERNMENTAL MANAGEMENT OF FEDERAL LAND AND RELIGIOUS PRACTICES.**

Cases involving land use have traditionally been decided in favor of the government, and thus against the free exercise of religion by Native Americans.<sup>84</sup> Though the RFRA did not appear to change this analysis, case law may be evaluating Native American Free Exercise land use claims similarly to mainstream religions.

In *Sequoyah v. Tennessee Valley Authority* upheld the proposed governmental construction of the Tellico Dam on the Little Tennessee River.<sup>85</sup> Cherokee Indians claimed the dam

would flood their sacred homeland.<sup>86</sup> The court found that, although the complaint asserted an irreversible loss of Cherokee culture and history, these were not interests protected by the Free Exercise Clause of the First Amendment.<sup>87</sup>

The Cherokee Indians failed to demonstrate that worship at Little Tennessee Valley was (1) inseparable from their way of life; (2) the cornerstone of their religious observance; (3) or that it played a central role in their religious ceremonies and practices.<sup>88</sup> The land at issue was, therefore, not the theological heart of their religion and thus the Free Exercise clause did not apply.

In *Badoni v. Higginson*, the Navajo sought to order the government to lower a reservoir that partially flooded the Rainbow Bridge National Monument, a sacred site.<sup>89</sup> The tribe also tried to compel the government to issue regulations controlling tourist behavior at the monument; and to temporarily close the monument to the public, on notice, for religious ceremonies.<sup>90</sup>

The court first noted that the government had a compelling interest in maintaining the level of the reservoir because it supplied both water and electricity for the region.<sup>91</sup> The court next stated that a governmental action must be coercive in order to potentially violate the Free Exercise Clause.<sup>92</sup> Here, the government was not forcing the Native American groups to do anything that was against their religion, nor depriving anyone of a governmental benefit for failure to take an action that was abhorrent to their religion. Finally, because the plaintiffs were seeking to compel the government to prevent the public from accessing areas of religious significance, the court reasoned that taking such action would violate the Establishment Clause.<sup>93</sup>

In *Wilson v. Block*, the Navajo and Hopi Indians sought to enjoin the clearing of fifty acres of forest to expand the Snowbowl ski resort in the Coconino National Forest in Northern Arizona.<sup>94</sup> However, they failed to show a substantial burden upon their religious practices.<sup>95</sup> To show a substantial burden, unlike in *Sequoyah*, this court did not require that the religious practice be central to the religion. Nonetheless, it required that the affected religious practice could not be performed elsewhere.<sup>96</sup>

The *Wilson* Court then considered whether the AIRFA protected the tribes from the proposed expansion.<sup>97</sup> Based on the legislative record, the court found that AIRFA did not create any additional rights. Rather, it merely required federal agencies to consider the impact of proposed regulations and actions upon Native Americans.<sup>98</sup>

More recently, in a similar dispute the Ninth Circuit in *Navajo Nation v. U.S. Forest Service* overruled the Arizona District Court's finding that the proposed expansion of the Snowbowl ski resort was constitutional under the First Amendment.<sup>99</sup> Contrary to the district court, the circuit court held that the proposed action constituted a substantial burden on the free exercise of religion. Moreover, it also held that the government did not have a compelling interest in the expansion of the Snowbowl ski resort.<sup>100</sup>

The owners of the ski resort and the government were seeking to expand the size of the resort and introduce artificial snow-making.<sup>101</sup> Although artificial snow-making expanded the ski season, it also entailed the use of treated sewage effluent.<sup>102</sup> The circuit court found that the proposed use of sewage effluent would be a burden of the highest order upon the tribes' right to freely exercise their religion.<sup>103</sup> The court noted that a burden must prevent the plaintiff from "engaging in religious conduct or having a religious experience" in order to trigger RFRA analysis.<sup>104</sup> Here, the proposed expansion would severely burden the

religious exercise of the Hopi and Navajo because it polluted the most sacred place of those tribes. Since their religious practices require pure natural resources, use of the treated sewage effluent would prevent the Navajo from conducting some ceremonies and would undermine the Hopi's entire system of belief.<sup>105</sup>

The circuit court agreed with the district court in that the government in general has a compelling interest in managing public recreational land. However, it argued that *O Centro* requires a more particularized compelling interest analysis than the lower court employed. Under that analysis, expanding the size and operating season of a ski resort that is located in the desert is not a compelling governmental interest.

The government also argued that it had a compelling interest in developing snow-play areas for non-skiers. Without these areas, non-skiers were having accidents by playing close to the road.<sup>106</sup> The circuit court rejected this argument because nothing in the trial record indicated that these safety concerns had any relationship to expansion of the resort.<sup>107</sup> The circuit court found that even if creation of a snow-play park was a compelling interest, introducing artificial snow-making and expanding the resort were not the least restrictive means of furthering such an interest.<sup>108</sup>

The owners of the resort also argued that complying with the Establishment Clause was a compelling governmental interest.<sup>109</sup> Therefore, in furtherance of this interest, the government should not accommodate Native American religious practices.<sup>110</sup> However, the circuit court noted that the Supreme Court has repeatedly held that the Constitution requires accommodation, rather than mere tolerance, of all religions.<sup>111</sup> The circuit court viewed refusal to allow the proposed expansion as a "permitted accommodation to avoid callous indifference."<sup>112</sup>

*The post-RFRA Navajo Nation decision interprets burdens upon the free exercise of religion more broadly than the pre-RFRA case-law.*

These land use cases hinged on the definition of what was a substantial burden on the free exercise of religion. For example, the *Sequoyah* Court did not view destruction of the Cherokee's ancestral lands as a substantial interest protected by the First Amendment.<sup>113</sup> Rather, to find a substantial burden it examined whether the infringed practice was (1) inseparable from a way of life; (2) the cornerstone of a religious observance; or (3) central to religious ceremonies and practices.<sup>114</sup> Since the destruction of the Cherokee's ancestral lands did not fall under any of these categories, the governmental action did not violate the Free Exercise Clause. The *Badoni* Court analyzed the substantiality of an imposed burden via whether or not the act or regulation is coercive.<sup>115</sup> Since the governmental act was not coercive, the Court did not find it in violation of the free exercise of religion. Also, the *Wilson* Court analyzed substantiality by asking whether a given religious practice could not be done

elsewhere.<sup>116</sup> Since the religious activity could be conducted elsewhere, the infringement did not violate the free exercise of religion.

The *Navajo Nation* Court, however, defined a substantial burden upon the free exercise of religion as actions preventing an individual from "engaging in religious conduct or having a religious experience."<sup>117</sup> This definition is broader than the definitions provided by the *Sequoyah*, *Badoni*, and *Wilson* courts. A potential explanation for this more inclusive definition is that the *Navajo Nation* case occurred after passage of the RFRA.

The *Navajo Nation* Court noted that the term 'exercise of religion' is defined more broadly under RFRA in distinguishing cases that allowed governmental activities that gravely impacted Native American religious practices.<sup>118</sup> Before, the Free Exercise Clause analysis examined whether an action prohibited the free exercise of religion. Under the RFRA analysis actions merely burdening the free exercise of religion may violate Free Exercise rights.<sup>119</sup>

The circuit court differentiated the *Lyng* and *Wilson* decisions because of this greater protection provided by the RFRA and also on factual differences.<sup>120</sup> These land use cases hinged on the definition of what was a substantial burden on the free exercise of religion. Therefore, while RFRA does not change the method of determining when a substantial right is infringed, its interpretation in *Navajo Nation* marks a post-RFRA land use case that protected Native American religious practices.

## ANALYSIS AND PREDICTIONS

This section will review federal court interpretation of when religious practices are protected from government actions or regulations; when governmental action substantially infringes such a right; and what constitutes a compelling governmental interest. Finally, it will predict the direction of federal court jurisprudence in light of the *Navajo Nation* decision.

### INTERPRETATION OF KEY ISSUES

In Native American Free Exercise jurisprudence, courts have required a higher showing that a practice was substantially burdened than in cases involving mainstream religions. In Free Exercise cases regarding mainstream religions, courts ordinarily decline any ability to measure the centrality of a religious practice.<sup>121</sup> In many Native American Free Exercise cases, however, courts have required the Native American group to prove the centrality of the religious practice. For example, for mainstream religions, it has sometimes been sufficient that a religious practice be in any way affected by a governmental act.<sup>122</sup> Conversely, in *Tawahongva*, the court subjectively examined the claimant's burden even when, in general, the act substantially burdened the free exercise of religion.<sup>123</sup> Other courts have required that a given practice could not be done elsewhere. Only when these high substantial burden requirements were satisfied would the courts be willing to apply the compelling interest test

analysis.<sup>124</sup>

However, even when this test is applied, courts are quicker to find both a compelling interest and that the government engaged in the least restrictive means of accomplishing this interest in cases involving the government's management of federal land.<sup>125</sup> Such an approach negatively impacts Native American religious practice because Native American sacred sites are often located upon federal land.

### FREE EXERCISE AND THE RFRA GOING FORWARD

Post-RFRA cases only addressing what the First Amendment prohibits the federal government from doing miss the point. The RFRA increases the prohibitions on what the federal government can do through the requirement that the government pursue its aim by the least restrictive means possible.<sup>126</sup> Cases that fail to recognize that the RFRA protects a broader range of conduct are also misguided because RFRA's expansive definition of 'exercise of religion' includes "any exercise of religion, whether or not compelled by, or central to, a system of religious belief."<sup>127</sup>

The RFRA was amended in 2000 upon passage of the Religious Land Use and Institutionalized Persons Act ("RLUIPA") of 2000 to change the understanding of the term 'exercise of religion.'<sup>128</sup> While the RFRA previously relied on the Court's understanding of the term as required by the First Amendment, RLUIPA expanded its meaning.<sup>129</sup>

Finally, based on *Navajo Nation's* different interpreta-

tion of the RFRA, courts may in the future analyze Native American Free Exercise cases in the same manner as the Free Exercise cases of mainstream religions. Such an interpretation of the RFRA would provide greater protection of Native Americans' rights to freely practice their religion. RFRA restored the method of analysis from before *Smith*<sup>130</sup> when mainstream religions received more protection than Native American religions.<sup>131</sup> Therefore, the RFRA alone would not seem to increase protection for the free exercise of Native American religious practices in the land use context.<sup>132</sup>

However, *Navajo Nation* used the RFRA framework with the RLUIPA definition of 'free exercise of religion' to protect the rights of Native Americans. The *Navajo Nation* court seriously questioned the government's asserted interest in expanding a ski resort and protected sacred Native American land from destruction. Also, contrary to previous cases, *Navajo Nation* did not examine the individual's ability to have this experience elsewhere or the coercive nature of the governmental action.<sup>133</sup> Rather, it analyzed whether the government had prevented an individual from "engaging in religious conduct or having a religious experience." Therefore, if *Navajo Nation* indicates a change in the way courts will evaluate governmental burdens on Native American religious practices, then Native American religious practices may receive the same level of accommodation as mainstream religious practices in the future.

## ENDNOTES

\*Jason Gubi is an alumnus of the College of New Jersey. After working for the National Security Agency, the author graduated from Fordham University School of Law in New York City in 2008. The author would first like to thank his brother Aaron Gubi and his friend Chait Desai, for their patience as he finished his first draft of the article while vacationing with them nearly a year ago. The author would also like to thank his friends Catherine LaRose and Yavar Bathaee, for reading over drafts of the article and encouraging him to pursue its publication. Finally, he would also like to thank Andrew Lim and the rest of The Modern American's editorial board. What mistakes remain, whether in substance or style, are the author's.

See U.S. CONST. amend. I (preventing Congress from making any law respecting an establishment of religion or from prohibiting the free exercise of religion).

<sup>2</sup> See generally, Lee Irwin, *Freedom, Law, and Prophecy: A Brief History of Native American Religious Resistance*, 21 American Indian Quarterly (Special Issue) Winter, 1997, at 35-55 (discussing oppressive federal government policies including the banning and criminalization of religious and spiritual practices and the subsidized conversion to Christianity of Native American children, often after being taken away from their parents); see also Crusade Watch, [http://www.crusadewatch.org/index.php?option=com\\_content&task=view&id=746&Itemid=128](http://www.crusadewatch.org/index.php?option=com_content&task=view&id=746&Itemid=128) (last visited Oct. 27, 2008).

<sup>3</sup> "Mainstream" in the context of this paper shall be understood to mean non-Native American religions in general, but more specifically, Judeo-Christian religions.

<sup>4</sup> See *Johnson v. M'Intosh* 21 U.S. 543, 573 (1823).

<sup>5</sup> See *id.*

<sup>6</sup> See Religious Freedom Restoration Act (RFRA), 42 U.S.C. §§ 2000bb – 2000bb-4(1993).

<sup>7</sup> U.S. CONST. amend. I, § 1.

<sup>8</sup> American Indian Religious Freedom Act (AIRFA), 42 U.S.C. § 1996 (1978).

<sup>9</sup> *Employment Div. v. Smith*, 494 U.S. 872, 874 (1990).

<sup>10</sup> See 42 U.S.C. § 1996.

<sup>11</sup> See 42 U.S.C. §§ 2000bb – 2000bb-4.

<sup>12</sup> *Id.* at § 2000bb-1.

<sup>13</sup> *City of Boerne v. Flores*, 521 U.S. 507, 534-35 (1997).

<sup>14</sup> *Guam v. Guerrero*, 290 F.3d 1210, 1220-21 (9th Cir. 2002) (holding RFRA constitutional as applied to the federal government).

<sup>15</sup> 42 USC § 2000bb-2(4); see also *Navajo Nation v. U.S. Forest Serv.*, 479 F.3d 1024, 1033 (9th Cir. 2007).

<sup>16</sup> See 42 USC §§ 2000bb-1(a), 2000bb(b).

<sup>17</sup> See, e.g., *Pierce v. Soc'y of Sisters*, 268 U.S. 510, 534-35 (1925) (recognizing a substantial burden upon religion when a state requires all parents to send their children to public school until age sixteen).

<sup>18</sup> See, e.g., *Lyng v. Nw. Cemetery Protective Ass'n*, 485 U.S. 439, 450 (1988) (requiring actual coercion before finding a substantial burden upon the free exercise of religion).

<sup>19</sup> See, e.g., *United States v. Hardman*, 297 F.3d 1116, 1126-27 (10th Cir. 2002) (noting that an eagle's feather is universally recognized as sacred for Native American religious practice).

<sup>20</sup> See, e.g., *Navajo Nation*, 479 F.3d at 1031-32 (finding a substantial burden on religion when the contamination of the Hopi's most sacred site would undermine the tribe's entire system of belief while simultaneously preventing the Navajo from engaging in particular ceremonies).

<sup>21</sup> See *Wisconsin v. Yoder*, 406 U.S. 205, 215 (1972).

<sup>22</sup> See *Hernandez v. Comm'r*, 490 U.S. 680, 699 (1989).

<sup>23</sup> See *Hardman*, 297 F.3d 1116 at 1128.

<sup>24</sup> See *United States v. Tawahongva*, 456 F. Supp. 2d 1120, 1133 (D. Ariz. 2006).

<sup>25</sup> See *United States v. Lee* 455 U.S. 252, 258-59 (1982).

<sup>26</sup> *Sherbert v. Verner*, 374 U.S. 398, 399-01 (1963).

<sup>27</sup> *Id.* at 399-406.

<sup>28</sup> See Jack S. Vaitayanonta, *In State Legislatures We Trust?: The "Compelling Interest" Presumption and Religious Free Exercise Challenges to State Civil Rights Laws*, 101 COLUM. L. REV. 886, 891-92, (2001).

<sup>29</sup> *Sherbert*, 374 U.S. at 404.

<sup>30</sup> *Id.* at 407.



## ENDNOTES CONTINUED

- <sup>31</sup> *Bowen v. Roy*, 476 U.S. 693, 707-08 (1986).
- <sup>32</sup> *Id.* at 696 (The defendant asserted a religious belief that control over one's life is essential to spiritual purity and indispensable to "becoming a holy person." The uniqueness of the Social Security number as an identifier would "rob the spirit" of his daughter and prevent her from attaining greater spiritual power.).
- <sup>33</sup> *Id.* at 707-08.
- <sup>34</sup> *Id.* at 706.
- <sup>35</sup> *Id.* at 708.
- <sup>36</sup> *Cf. Bowen*, 476 U.S. at 708.
- <sup>37</sup> *Yoder*, 406 U.S. at 209-14 (1972) (noting that formal education "beyond the eighth grade is contrary to Amish beliefs, not only because it places Amish children in an environment hostile to Amish beliefs ... but also because it takes them away from their community, physically and emotionally, during the crucial and formative adolescent period of life").
- <sup>38</sup> *Id.* at 236.
- <sup>39</sup> *Id.* at 220.
- <sup>40</sup> *Lyng v. Nw. Cemetery Protective Ass'n*, 485 U.S. 439, 441-43 (1988).
- <sup>41</sup> *Id.* at 442 (noting that successful completion of certain religious ceremonies by several Native American groups required that the area remain pristine).
- <sup>42</sup> *Id.* at 443.
- <sup>43</sup> *See id.* at 444-45.
- <sup>44</sup> *Id.* at 473-75.
- <sup>45</sup> *Id.* at 444.
- <sup>46</sup> *Lyng*, 485 U.S. at 445.
- <sup>47</sup> *Id.* at 450.
- <sup>48</sup> *Id.* at 448.
- <sup>49</sup> *Id.* at 450.
- <sup>50</sup> *Id.* at 453.
- <sup>51</sup> *Id.* at 452.
- <sup>52</sup> *Lyng*, 485 U.S. at 453.
- <sup>53</sup> *Id.* at 453.
- <sup>54</sup> *Cf. id.*
- <sup>55</sup> *See id.* (indicating that *Sherbert* and *Yoder* did not require application of the compelling interest test in a case involving governmental management of its own property); *see* 42 USC § 2000bb(b)(1) (noting that the purpose of RFRA is to restore the compelling interest test as set forth in *Sherbert* and *Yoder*).
- <sup>56</sup> *See id.* at 452 (indicating that *Sherbert* and *Yoder* did not require application of the compelling interest test in a case involving governmental management of its own property); *see* RFRA § 2000bb(b) (noting that the purpose of RFRA is to restore the compelling interest test as set forth in *Sherbert* and *Yoder*).
- <sup>57</sup> *See* RFRA § 2000bb.
- <sup>58</sup> *See, e.g., Lyng*, 485 U.S. at 439.
- <sup>59</sup> *Yoder*, 406 U.S. at 209-14.
- <sup>60</sup> *Lyng*, 485 U.S. at 453.
- <sup>61</sup> *Id.* at 441-45.
- <sup>62</sup> *Id.* at 453.
- <sup>63</sup> *Smith*, 494 U.S. at 879.
- <sup>64</sup> *See id.* at 886.
- <sup>65</sup> *Cf. id.* at 888 (noting that the compelling interest test would require constitutionally required religious exemptions from civic obligations).
- <sup>66</sup> *Gonzales v. O Centro Espirita Beneficente Uniao Do Vegetal*, 546 U.S. 418, 423 (2006).
- <sup>67</sup> *Id.* at 426-27.
- <sup>68</sup> *Id.*
- <sup>69</sup> *Id.* at 426.
- <sup>70</sup> *Id.* at 430-32.
- <sup>71</sup> *Id.* at 433.
- <sup>72</sup> *Hardman*, 297 F.3d at 1132-35.
- <sup>73</sup> *Id.* at 1132.
- <sup>74</sup> *Id.*
- <sup>75</sup> *Id.* at 1126-27.
- <sup>76</sup> *Id.* at 1127-29.
- <sup>77</sup> *Id.* at 1132-35.
- <sup>78</sup> *Hardman*, 297 F.3d at 1132.
- <sup>79</sup> *Id.* at 1132-35.
- <sup>80</sup> *Tawahongva*, 456 F. Supp. 2d at 1131-32.
- <sup>81</sup> *Id.*
- <sup>82</sup> *Id.*
- <sup>83</sup> *See id.* at 1132.
- <sup>84</sup> *Lyng*, 485 U.S. at 439, can also be considered a land use case.
- <sup>85</sup> *Sequoyah v. Tennessee Valley Authority*, 620 F.2d 1159, 1165 (6th Cir. 1980).
- <sup>86</sup> *Id.* at 1160.
- <sup>87</sup> *Id.* at 1164-65.
- <sup>88</sup> *Id.* at 1164.
- <sup>89</sup> *Badoni v. Higginson*, 638 F.2d 172 (10th Cir. 1980).
- <sup>90</sup> *Id.* at 176.
- <sup>91</sup> *Id.* at 177.
- <sup>92</sup> *Id.* at 176-77.
- <sup>93</sup> *Id.* at 179.
- <sup>94</sup> *Wilson v. Block*, 708 F.2d 735, 737-38 (C.A.D.C. 1983).
- <sup>95</sup> *Id.* at 740.
- <sup>96</sup> *Id.* at 742-43.
- <sup>97</sup> *Id.* at 745-47.
- <sup>98</sup> *Id.* at 746.
- <sup>99</sup> *Navajo Nation*, 479 F.3d at 1046.
- <sup>100</sup> *Id.*
- <sup>101</sup> *Id.* at 1029.
- <sup>102</sup> *Id.*
- <sup>103</sup> *Id.* at 1043.
- <sup>104</sup> *Id.*
- <sup>105</sup> *Navajo Nation*, 479 F.3d at 1043.
- <sup>106</sup> *Id.* at 1044.
- <sup>107</sup> *Id.* at 1045.
- <sup>108</sup> *Id.*
- <sup>109</sup> *Id.*
- <sup>110</sup> *Id.*
- <sup>111</sup> *Navajo Nation*, 479 F.3d at 1046.
- <sup>112</sup> *Id.* (Because the circuit court found that the government did not have a compelling interest in expanding the ski resort, it did not need to address whether the means of accomplishing this interest was the least restrictive possible).
- <sup>113</sup> *Sequoyah*, 620 F.2d at 1164.
- <sup>114</sup> *See id.*
- <sup>115</sup> *See Badoni*, 638 F.2d at 176.
- <sup>116</sup> *See Wilson*, 708 F.2d at 742-43.
- <sup>117</sup> *Id.*
- <sup>118</sup> *Navajo Nation*, 479 F.3d at 1032-34.
- <sup>119</sup> *See id.* at 1032-33.
- <sup>120</sup> *Id.* at 1046-47.
- <sup>121</sup> Luralene D. Tapahe, *After the Religious Freedom Restoration Act: Still No Equal Protection for First American Worshipers*, 24 N.M.L. REV. 331, 336-338 (1994) (noting that in most free exercise cases, the Supreme Court does not analyze the centrality of an activity to a religious adherent; its importance is usually accepted as fact).
- <sup>122</sup> *See Tapahe*, 24 N.M.L. REV. at 338 (noting that government officials can not determine what orthodoxy in religion is, thus indicating that it is the individual who will ordinarily make this determination).
- <sup>123</sup> *Tawahongva*, 456 F. Supp. 2d at 1131-32.
- <sup>124</sup> *See, e.g., Sequoyah*, 620 F.2d at 1160-65; *see e.g., Wilson*, 708 F.2d at 737-46.
- <sup>125</sup> *See, e.g., Sequoyah*, 620 F.2d at 1160-6; *see e.g., Wilson*, 708 F.2d at 737-46; *see, e.g., Lyng*, 485 U.S. at 441-53.
- <sup>126</sup> *See Navajo Nation*, 479 F.3d at 1043-46.
- <sup>127</sup> *See Religious Land Use and Institutionalized Persons Act (RLUIPA)*, 42 U.S.C. § 2000cc-5(7)(A).
- <sup>128</sup> *See Navajo Nation*, 479 F.3d at 1032.
- <sup>129</sup> *See id.* at 1031-34.
- <sup>130</sup> *See* 42 USC § 2000bb(b)(1).
- <sup>131</sup> *See generally*, Tapahe, *supra* note 122.
- <sup>132</sup> *See id.* at 345-47.
- <sup>133</sup> *See Navajo Nation*, 479 F.3d at 1032.

# Whose Body Is It Anyway: Justice and the Integrity of the Person<sup>1</sup>

By  
Meghan Boone

**T**he human body enjoys a special place in the law. Many of our most basic rights as citizens, including the right to be free from unreasonable search and seizures, the right to be free from physical assaults by others, and the right to privacy, arise from the idea that we should be able to control what happens to our own bodies. This principle of the inviolable body is also the basis for preventing individuals from utilizing their body or body parts in the economic marketplace and gives rise to legislation such as the prohibition on the sale of organs, the invalidation of surrogacy contracts, and the criminalization of prostitution. In the book, *Whose Body Is It Anyway: Justice and the Integrity of the Person*, Cécile Fabre posits that the current legal system would be more just if we disavowed ourselves of this principle of the inviolable body, or the idea that the body is legally special, and instead accepted a legal system in which we all have a right to each other's bodies, including our own. She points out that, "justice requires conferring on the sick a right to the organs of the dead and, in some cases, the living; and...requires conferring on individuals a right to buy and sell organs, sex, and reproductive services."

Fabre admits at the outset of the book that because the principles she advances may disturb our traditional doctrines and principle, she expects little popular support. However, despite my initial distress with an argument that asserts I should not have the right to decide what happens to my own body, I eventually found that the text raised interesting questions about the contradictions inherent in our legal system's treatment of the physical body. As Fabre aptly notes, "our legal and political tradition is such that we have the right to deny others access to our person, even though doing so would harm those who need such access; however, we lack the right to use ourselves as we wish in order to raise income, even though we do not necessarily harm other by doing so..." After reading her book, I found myself agreeing with these inconsistencies under our legal system; while the law tells us that we have complete control over our physical persons, we are in reality legally barred from selling our organs or sexual services, even if doing so causes no harm to others and, in the case of organ sales, even helps those in great need.

To advance her argument, Fabre relies on the fundamental soundness of the principle of distributive justice, which states that some redistribution of wealth or resources across society is necessary in order to achieve justice for all. She points to examples from western society, such as the prevalence of social programs like welfare and the redistribution of wealth through taxation, to illustrate that the principle of distributive justice is already generally accepted. Fabre does not argue that it is necessary to have a wholesale redistribution of resources in which every member of society is given resources in exactly equal amounts. Instead, she works from a framework that stipulates only that each individual has a right to the resources he or she

requires in order to live a "minimally flourishing life," and pursue a "conception of the good." Fabre argues that the natural consequence of meeting these basic goals is allowing those in need, a right to the material resources, including the body, of other members of society. Without these resources, many people are unable to live a minimally flourishing life, or even any life at all.

After asserting that the principles of distributive justice dictate that members of society have a right to the bodies of others, Fabre then explains how the "redistribution" of bodily resources would be accomplished. In chapters 3 through 8, respectively, Fabre advocates for the creation of a mandatory civilian service, the confiscation of organs from both cadavers and living people, and the legalization of the sale of organs, prostitution, and surrogacy contracts.

The arguments I found most compelling were those contained within Fabre's thesis as it relates to the confiscation of organs. Fabre attempts to convince the reader that many of the arguments in favor of absolute bodily autonomy are both misguided and unjust. First, she claims that, compared to another individual's right to live a minimally flourishing life, or in many cases to live at all, a right to absolute bodily integrity seems weak. Moreover, Fabre argues that the confiscation of organs does not deny bodily autonomy, but instead places on it a qualification that the redistribution of organs should occur when individuals are impaired in their ability to lead a minimally flourishing life. She does allow those with true conscientious objections the option to refuse to give their organs to those in need; an absolute requirement that would violate an individual's conscience would also harm his or her ability to realize the "conception of the good." By allowing for these conscientious objections, Fabre addresses the only strong argument against instituting an organ confiscations system. Further, these allowances give her argument internal consistency because they reveal she is equally concerned that all members of society are able to live and pursue their own ideals.

While I was tempted to agree with Fabre's oral arguments in favor of an organ confiscation of the system. I failed to find her chapter regarding the legalization of prostitution persuasive. Her defense of prostitution is especially relevant to current discussions in the feminist community, who questions power differentials, gender equality and the commodification of women's bodies in the marketplace. Fabre acknowledges these issues exist but ultimately argues that the legalization and regulation of the sex industry would shield women from the harm they might otherwise face for supplying such services on the black market. Unlike the more persuasive moral arguments Fabre makes for practices such as organ confiscation, she never reaches a similar conclusion that the legalization of prostitution is moral or just in its own right. Instead, Fabre concludes that the problem with prostitution is not the act of providing sexual services for money

admits that the vast majority of women would not choose to prostitute themselves if they had access to other economic opportunities. Thus, her position that an absolute right to prostitute oneself is required in the interest of justice, is not persuasive.

In the end, *Whose Body Is It Anyway?* is best read as a philosophical text, and not a practical guide to possible changes in the legal treatment of the body. Although it sheds light onto contradictory aspects of both the application of distributive justice and the sacrosanct treatment of the human body in the legal

system, it is neither an “endeavour in social policy,” nor a “party manifesto.” Additionally, due to both Fabre’s writing style and the often dense and complicated philosophical ideas she relies on to make her arguments, the book is neither an easy nor a quick read, especially for anyone who does not have a background in philosophy. However, what is effective about her book is that it both provokes and engages the reader by challenging us to reexamine one of our most basic ideas - that our bodies should belong solely to ourselves.

## ENDNOTES

<sup>1</sup> CÉLICE FABRE, *WHOSE BODY IS IT ANYWAY: JUSTICE AND THE INTEGRITY OF THE PERSON 1* (Oxford Univ. Press, 2008).

### ANNOUNCING

**TUESDAY, APRIL 7, 2009**

**The Modern American Annual Symposium:**

**Revisiting the Separation of Church & State in the United States**

*"Congress shall make no law respecting an establishment of religion. . . ."*

*- First Amendment of the Constitution of the United States of America*

Although the United States is constitutionally bound by the separation of church and state, religion has undoubtedly had a major influence on American law and policy. Religion has influenced discourse concerning a variety of issues in America including reproductive rights, foreign policy, marriage, social services, and education. This symposium will revisit the implications of the Establishment Clause, explore to what extent the separation of church and state in America has held true, and discuss which religions have the most legal and political influence, why they do, and the effect such influence has in a religiously and culturally diverse America. The symposium will also analyze recent legislation and state constitutional amendments as well as the interaction between the American people, religion, and state in the regulation of morality.

\* CLE\* Presented by The Modern American

# EXTENDING TITLE VII PROTECTION TO NON-GENDER-CONFORMING MEN

By  
Colleen Keating\*

## INTRODUCTION

Title VII of the 1964 Civil Rights Act, which prohibits sex discrimination in employment,<sup>1</sup> is generally seen as a measure intended to “remedy the economic deprivation of women” by placing them “on an equal footing with men” in the workplace.<sup>2</sup> While the overwhelming majority of sexual harassment complaints filed with the Equal Employment Opportunity Commission, the federal agency that enforces Title VII, are brought by women,<sup>3</sup> men are also victims of sex discrimination in the workplace—especially those who do not present themselves in the way their coworkers or employers believe a man should. For example, men who wear lipstick and skirts refuse to conform to social demands about the way men “ought” to look. Quietness and passivity defy the stereotype that men are generally assertive and aggressive. Men who have sexual relationships with other men challenge the heterosexist view that only male-female sexual relationships are “natural.” However, federal courts have been reluctant to extend the protections afforded women under Title VII to non-gender-conforming men. An overly narrow conception of sex discrimination blinds courts to the fact that these men are also victims of sex discrimination. And in turn, the denial of protection for non-gender-conforming men directly contributes to the continued subordination of women.

Many scholars have argued that the plain language of Title VII and the Supreme Court’s interpretation of the statute in *Price Waterhouse v. Hopkins* provides a sufficient framework for protecting men who experience discrimination as a result of failing to conform to gender norms.<sup>4</sup> Although federal courts acknowledge that sex stereotyping is a form of sex discrimination,<sup>5</sup> men who do not satisfy social expectations of masculinity have had difficulty succeeding on Title VII claims. Courts often conflate effeminacy with homosexuality,<sup>6</sup> viewing “feminine” behavior in men as a manifestation of homosexuality (that is, a marker for one’s *status*), rather than recognizing “homosexual” as a label that society places on men who engage in non-gender-conforming *conduct* (namely, having sex and/or romantic relationships with other men). Consequently, when faced with a sex discrimination claim asserted by an “effeminate” male plaintiff who is either gay or perceived to be so by his coworkers, courts typically rule against the plaintiff on the ground that Title VII does not protect people who are discriminated against on the basis of sexual orientation.

Courts have also rejected the majority of sex discrimination claims brought by transgender persons.<sup>7</sup> Changing genders can be seen as the ultimate form of gender nonconformity.

When an individual with biologically male genitals takes female hormones and/or undergoes gender reassignment surgery, she violates the social dictate that she should present herself as a person of the gender she was assigned at birth. I. Bennett Capers, a professor of law at Hofstra Law School, suggests that gay men and lesbians, by their very existence, call into question the “complementarity” of the sexes and their respective accepted characteristics.<sup>8</sup> Similarly, transgender people challenge society’s dichotomous concept of gender; they undermine the notion that men and women are opposites of one another and that certain traits are naturally linked to a person’s biological sex.<sup>9</sup> Capers contends that women will continue to face subordination in the workplace as long as the concept of a binary gender system exists.<sup>10</sup> Accordingly, courts would best further Title VII’s purpose by reading the statute as covering a “continuum of genders,”<sup>11</sup> including gay, lesbian, and transgender individuals.

*discrimination against non-gender-conforming individuals is sex discrimination grounded in sex stereotyping and heterosexist expectations.*

This article surveys a number of cases and identifies three mechanisms employed by courts to deny non-gender-conforming individuals’ Title VII claims. First, the majority of courts fail to distinguish between *conduct* and *status*. Individuals who self-identify or are labeled as homosexual or transgender often lose Title VII claims because courts conflate this unprotected *status* with the individuals’ non-gender-conforming *conduct*. A second denial mechanism is closely related. In many cases involving homosexual or transgender plaintiffs, both sexual orientation/gender identity discrimination and sex discrimination are at work. The existence of the former, which is not prohibited under current Title VII jurisprudence, often obscures the existence of the latter. Finally, courts fail to recognize that sexual orientation and gender identity/expression discrimination are actually forms of sex discrimination. Homosexual and transgender men and women refuse to conform to the gender roles that society assigns, on the basis of biological sex.<sup>12</sup> This article argues that discrimination against non-gender-conforming individuals is sex discrimination grounded in sex stereotyping and heterosexist expectations.

## I. EARLY CASES

*Holloway v. Arthur Andersen and Co.*<sup>13</sup> was one of the first Title VII cases brought by a transgender individual. The plaintiff, Ramona Holloway, was born a biological male. After starting female hormone treatments, Holloway informed her employer, Arthur Andersen, that she was preparing to undergo sex reassignment surgery.<sup>14</sup> She began wearing lipstick and nail polish to work, as well as a feminine hairstyle, clothing, and jewelry.<sup>15</sup> A few months later, after she requested that company records be changed to reflect her new female name, Holloway

was fired.<sup>16</sup>

Holloway's supervisor explained in an affidavit that Holloway was terminated because her "dress, appearance, and manner . . . were such that it was very disruptive and embarrassing to all concerned."<sup>17</sup> This evidence clearly indicated that Holloway was fired because her employer did not approve of her non-gender-conforming behavior.<sup>18</sup> Nevertheless, the Ninth Circuit concluded that Arthur Andersen had not violated Title VII by firing Holloway for initiating the process of sex transition.<sup>19</sup> The judges stated: "Holloway has not claimed to have been treated discriminatorily because she is male or female, but rather because she is a transsexual who chose to change her sex . . . A transsexual individual's choice to undergo sex change surgery does not bring that individual, nor transsexuals as a class, within the scope of Title VII."<sup>20</sup> The court further reasoned that the purpose of Title VII was "to remedy the economic deprivation of women as a class" and that Congress had not "shown any intent other than to restrict the term 'sex' to its original meaning."<sup>21</sup>

Circuit Judge Alfred T. Goodwin dissented, interpreting the plain language of the statute to protect Holloway.<sup>22</sup> Although Congress "probably never contemplated that Title VII would apply to transsexuals," he argued, Holloway had a legitimate sex discrimination claim.<sup>23</sup> Judge Goodwin found that because Holloway was a female on the day she was fired, she was a member of the class that Congress intended Title VII to protect.<sup>24</sup> He argued that the manner in which a plaintiff became a member of the protected class, whether via birth as a biological female or through gender reassignment surgery, should not matter for the purpose of a Title VII analysis.<sup>25</sup>

Even though Judge Goodwin would have allowed Holloway to proceed with her Title VII claim, his analysis of the case fell short. Because he stressed the fact that Holloway was a woman and therefore a member of "the disadvantaged class" that Congress intended Title VII to protect, it is doubtful that he would have similarly held in favor of a female-to-male transgender plaintiff. Moreover, Arthur Andersen did not discriminate against Holloway because she was a woman. Holloway's supervisor suggested that Holloway find a new job where her transgender identity would be unknown<sup>26</sup>—indicating that Holloway's femaleness was problematic only because her employer was aware that Holloway had been born a biological male and was uncomfortable with her presenting as a woman.

The Seventh Circuit Court of Appeals rejected a similar Title VII claim brought by a transgender plaintiff in *Ulane v. Eastern Airlines*.<sup>27</sup> Karen Ulane, born a biological male, was a pilot for Eastern Airlines when she began taking female hormones, developed breasts, and underwent sex reassignment surgery.<sup>28</sup> She was fired when she attempted to return to work after her surgery.<sup>29</sup> After Ulane sued the airline on a Title VII theory, the district court reinstated her as a pilot with full seniority, back pay, and attorneys' fees. The Seventh Circuit overturned that ruling, holding that Title VII did not protect transgender people. The appellate court reasoned that "[a] prohibition against discrimination based on an individual's sex is not synonymous with a prohibition against discrimination based on an individual's sexual identity disorder or discontent with the sex into which they were born."<sup>30</sup> The court maintained that if Congress had intended the statute to "apply to anything other than the traditional concept of sex," then "surely the legislative history would have at least mentioned its intended broad coverage of homosexuals, transvestites, or transsexuals."<sup>31</sup>

Like Holloway, Ulane suffered discrimination because she did not conform to gender stereotypes. At the time of these decisions, courts had not yet recognized that gender stereotyping is a form of sex discrimination.<sup>32</sup> The courts' analysis in *Holloway* and *Ulane* was similar: The plaintiffs were discriminated against because they were transgender; their *status*, rather than their non-gender-conforming *conduct*, was the basis for the discriminatory treatment. The next step in the analysis was simple: Transgender individuals are not a protected class under Title VII, so the plaintiffs' claims necessarily failed. Under early Title VII jurisprudence, it would always be legal for employers to discriminate against transgender employees.

## II. THE COURTS' DEVELOPING UNDERSTANDING OF SEX DISCRIMINATION

In *Price Waterhouse v. Hopkins*, the Supreme Court broadened its concept of "sex discrimination," holding that Title VII prohibits employers from discriminating against employees who do not conform to sexual stereotypes.<sup>33</sup> The plaintiff, Ann Hopkins, was the only woman among eighty-eight candidates up for partnership in Price Waterhouse's Washington, D.C. office in 1982.<sup>34</sup> Hopkins neither made partner nor was rejected; instead, her candidacy was held over for reconsideration.<sup>35</sup> When Hopkins was not nominated for partnership the following year, she sued the firm under Title VII.

The district court found compelling evidence that Price Waterhouse's decision not to offer Hopkins partnership in the firm was directly tied to her sex. The court noted that "none of the other partnership candidates at Price Waterhouse that year had a comparable record in terms of successfully securing major contracts for the [firm]."<sup>36</sup> Partners and clients alike praised Hopkins's work, calling her "extremely competent and intelligent," "strong and forthright, very productive, energetic, and creative."<sup>37</sup> Many Price Waterhouse partners, however, "reacted negatively to Hopkins's personality because she was a woman."<sup>38</sup> One partner called her "macho," while another felt that she "overcompensated for being a woman," and a third said that she needed to take a class at "charm school."<sup>39</sup> Another male partner explained that if Hopkins wanted to improve her chances of making partner, she should "walk more femininely, talk more femininely, dress more femininely, wear make-up, have her hair styled, and wear jewelry."<sup>40</sup>

Based on this evidence, the district court concluded that "Price Waterhouse had unlawfully discriminated against Hopkins on the basis of sex by consciously giving credence and effect to partners' comments that resulted from sex stereotyping."<sup>41</sup> The Supreme Court affirmed the lower court's holding. In his opinion for the Court, Justice Brennan declared: "We are beyond the day when an employer could evaluate employees by assuming or insisting that they matched the stereotype associated with their group, for in forbidding employers to discriminate against individuals because of their sex, Congress intended to strike at the entire spectrum of disparate treatment of men and women resulting from sex stereotypes."<sup>42</sup> The Court ruled that "gender must be irrelevant to employment decisions"<sup>43</sup> and that "an employer who acts on the basis of a belief that a woman cannot be aggressive, or that she must not be, has acted on the basis of gender."<sup>44</sup>

It logically follows from the *Price Waterhouse* decision

that an employer who discriminates against a male employee based on his refusal to conform to gender norms has violated Title VII. Nevertheless, for years after *Price Waterhouse*, federal courts disagreed about whether the statute prohibits discrimination against Ann Hopkins's male counterpart: the effeminate man.<sup>45</sup> For male plaintiffs, a significant obstacle was the tendency of courts to conflate impermissible sex stereotyping with sexual orientation discrimination, which courts have repeatedly held is not prohibited by Title VII.<sup>46</sup> Put differently, when considering a "feminine" male employee, courts generally assumed that he faced discrimination because he was gay or perceived to be so, rather than finding that the employer had penalized the plaintiff for not conforming to male stereotypes.

For example, in *Dillon v. Frank*,<sup>47</sup> plaintiff Ernest Dillon's coworkers verbally abused him, calling him a "fag" and taunting, "Dillon sucks dicks."<sup>48</sup> Graffiti at the work site declared "Dillon sucks dicks" and "Dillon gives head."<sup>49</sup> After three years of harassment, Dillon quit his job and sued his former employer under Title VII.<sup>50</sup> Dillon argued that his was a case of sex stereotyping, contending that he was harassed because he was not "macho" enough in his coworkers' eyes.<sup>51</sup> While the Sixth Circuit acknowledged that the harassment Dillon suffered "was clearly sexual in nature,"<sup>52</sup> the court held that Dillon was subjected to a hostile work environment because his coworkers believed he was gay; therefore, their actions constituted sexual orientation discrimination not prohibited by Title VII.<sup>53</sup> The court found there was no evidence of sex stereotyping and affirmed the district court's dismissal of Dillon's lawsuit.<sup>54</sup>

*Dillon* offers an example of how federal courts often treat male and female Title VII plaintiffs differently. In cases of male-on-female sexual harassment, courts tend to take an "I-know-it-when-I-see it" approach.<sup>55</sup> Had Dillon been a woman, he would have had a quintessentially actionable sex discrimination case, and the court almost certainly would have come out in his favor. But when it comes to male plaintiffs harassed by other men, courts set the bar much higher.<sup>56</sup>

Why did the *Dillon* court get it wrong? First, the possibility that the plaintiff was a victim of sexual orientation discrimination, as suggested by the "fag" epithet, obscured the sex discrimination at work in the case. No evidence existed in the record indicating why Dillon's coworkers believed he was gay; presumably there was something about Dillon's appearance or mannerisms, as he argued, that his coworkers believed was not "macho" or "masculine" enough.<sup>57</sup> The court's second error was its failure to distinguish between non-gender conforming conduct and homosexual orientation. Dillon's coworkers harassed him by referring to sexual acts that Dillon allegedly performed with other men; the discrimination centered on Dillon's perceived *conduct*. The court, however, found that Dillon was discriminated against because of his perceived homosexual *status*. This reasoning was problematic because even if Congress amended Title VII to prohibit sexual orientation discrimination, effeminate men—both gay and straight—might remain unprotected.<sup>58</sup> That is, while it would be impermissible to fire a gay man because of his homosexuality, it might be lawful to fire him for being a man who acts too much like a woman.

This case helps illustrate that discrimination against men who are gay, or perceived to be so, is a form of sex stereo-

typing. Discrimination against homosexual men is grounded in heterosexist expectations that "real" men should date and have sex with women and not other men.<sup>59</sup> Dillon's coworkers mocked him by suggesting that he took the submissive, stereotypically "female" role in fellatio. Mary Ann Case, a professor of law at the University of Chicago Law School, has suggested that the harassment of gay men for their receptive role in sexual activity is a form of discrimination against the feminine, since it is based on the assumption that "real men . . . always tak[e] the active/masculine role in bed and elsewhere."<sup>60</sup> Thus, the subordination of both gay men and women is closely linked.

Courts may be more inclined to protect female victims of sex stereotyping, like Ann Hopkins, than effeminate men because "masculine" qualities in a woman are typically far less socially problematic than "feminine" behavior in a man.<sup>61</sup> Furthermore, male employees do not find themselves in a Hopkins-like bind because characteristics typically labeled as feminine are not as valued in the workplace as those characteristics deemed masculine. Consider, for instance, a 2004 incident in

which California governor, Arnold Schwarzenegger, criticized his political opponents by calling them "girlie men."<sup>62</sup> Schwarzenegger did not mean to suggest that the lawmakers in question were homosexual or effeminate; instead, he was accusing them of being weak or ineffective. A spokesperson for the governor even explained that the term was "an effective

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*Discrimination against homosexual men is grounded in stereotypes that "real" men should date and have sex with women and not other men.*

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way to convey wimpiness."<sup>63</sup> Schwarzenegger's statement implies that the only people who belong in positions of power are "real" men, who are physically strong, macho, and aggressive.<sup>64</sup> The underlying assumption is that women – and men who are too much like women – cannot perform effective work. Case has argued that this "disfavoring of characteristics gendered feminine may work to the systematic detriment of women and thus should be analyzed as a form of sex discrimination."<sup>65</sup> Interpreting Title VII to protect men who "act like women" is thus absolutely crucial to ending discrimination against women in the workplace. "If women [are] protected for being masculine but men [can] be penalized for being effeminate, this. . . would send a strong message of subordination to women, because it would mean that feminine qualities, which women are disproportionately likely to display, may legitimately be devalued although masculine qualities may not."<sup>66</sup>

In 1997, the Seventh Circuit became one of the first courts to recognize that discrimination against a man who does not satisfy social expectations of masculinity is sex discrimination. The sixteen-year-old male plaintiff in *Doe v. City of Belleville*<sup>67</sup> was dubbed a "fag" and "queer" by his coworkers because he wore an earring.<sup>68</sup> One coworker asked if the plaintiff was a boy or a girl, called the plaintiff his "bitch," and repeatedly threatened to take him out into the woods and "get [him] up the ass."<sup>69</sup> He also grabbed the plaintiff's testicles to "find out if [he was] a girl or a guy."<sup>70</sup>

Fearing that he would be sexually assaulted, Doe quit his job and sued his former employer for violating Title VII.

The district court dismissed Doe's complaint, holding that the plaintiff could not show that he was harassed on the basis of sex because his coworkers were also heterosexual men.<sup>71</sup> However, the Seventh Circuit rejected the notion that a straight male plaintiff could not be sexually harassed in violation of Title VII by another straight male. The appellate court pointed out that if the plaintiff had been a woman and her breasts had been grabbed, most courts would accept this as *prima facie* evidence of sex discrimination. The motivation for the harassment is beyond the point, the court said: "When a male employee's testicles are grabbed . . . the point is that he experiences that harassment as a man, not just as a worker."<sup>72</sup> It further reasoned:

"[i]f [the plaintiff] were a woman, no court would have any difficulty construing such abusive conduct as sexual harassment. And if the harassment were triggered by that woman's decision to wear overalls and a flannel shirt to work, for example – something her harassers might perceive to be masculine just as they apparently believed [the plaintiff's] decision to wear an earring to be feminine – the court would have all the confirmation that it needed that the harassment indeed amounted to discrimination on the basis of sex."<sup>73</sup>

The circuit courts remained divided over whether same-sex harassment was actionable under Title VII until the Supreme Court answered in the affirmative in *Oncale v. Sundowner Offshore Services, Inc.*<sup>74</sup> The plaintiff, Joseph Oncale, was part of an all-male crew on an offshore oil rig.<sup>75</sup> He was apparently targeted for being slender, longhaired, and wearing an earring.<sup>76</sup> Oncale's coworkers threatened to rape him, and one held Oncale down while another pushed a bar of soap into his anus.<sup>77</sup> Oncale quit soon after the assault in the shower, scared that he would be raped on the job.<sup>78</sup>

The Supreme Court unanimously reversed the Fifth Circuit's decision that Oncale could not bring a Title VII claim against his (male) harassers. Writing for the Court, Justice Scalia noted: "As some courts have observed, male-on-male sexual harassment in the workplace was assuredly not the principal evil Congress was concerned with when it enacted Title VII . . . But statutory provisions often go beyond the principal evil to cover reasonably comparable evils, and it is ultimately the provisions of our law rather than the principle concerns of our legislators by which we are governed."<sup>79</sup>

Justice Scalia emphasized, however, that not all sexual harassment violates Title VII. A plaintiff "must always prove that the conduct at issue was not merely tinged with offensive sexual connotations, but actually constituted discrimination . . . because of . . . sex."<sup>80</sup> The Court held that when the harasser and the victim are of the opposite sex, there is a reasonable inference that the harasser was acting 'because of' sex.<sup>81</sup> A similar inference can be drawn when the harasser is homosexual and the victim is of the same sex.<sup>82</sup> When such an inference is not available, however, a same-sex victim must offer evidence that the harasser either treated men and women differently, or was motivated by hostility to the presence of a particular sex in the workplace.<sup>83</sup>

Although *Oncale* acknowledged that men could sexually harass other men, the three evidentiary paths to a same-sex Title VII claim that the Court laid out did not represent a significant broadening of the Court's understanding of sex discrimination. Justice Scalia failed to cut through the gender dichotomy and merely incorporated same-sex relations into the mix.<sup>84</sup> Notably absent from his analysis was a discussion of male sex stereotyping or non-gender-conforming behavior. In fact, the opinion did not mention Oncale's appearance, which might have been insufficiently "masculine" for his coworkers and thus an impetus for the discrimination. Justice Scalia did not even cite the Court's holding in *Price Waterhouse*, which had been decided only nine years earlier. The concept of a man who wore lipstick or walked and talked in an overly "feminine" way does not seem to have crossed the Justices' minds.

### III. THE COURTS' CONTINUING FAILURE TO PROTECT NON-GENDER-CONFORMING MEN

Even after *Price Waterhouse* and *Oncale*, homosexual and transgender Title VII plaintiffs continued to face an uphill battle. In theory, under the mixed motives doctrine, if the evidence suggests that an employer's decision was partly motivated by sexual orientation or gender identity discrimination (both of which are not prohibited by Title VII), a plaintiff is still protected by Title VII if he or she was also discriminated against for non-gender-conforming behavior.<sup>85</sup> Yet in reality, in the majority of cases where both sexual orientation discrimination and sex discrimination occur, the existence of the former blinds courts to the plaintiff's cognizable Title VII claim.<sup>86</sup>

For example, in *Bibby v. Coca-Cola*,<sup>87</sup> a coworker repeatedly called the male plaintiff a "sissy" and yelled, "everybody knows you take it up the ass."<sup>88</sup> The court granted summary judgment for the employer on the plaintiff's Title VII action, finding that the plaintiff, who was gay, was harassed because of his sexual orientation and not because of sex (that is, his failure to adhere to gender norms).<sup>89</sup> The court overlooked the fact that "sissy" is an insult reserved for boys and men who are not perceived as sufficiently masculine.<sup>90</sup> A New York district court similarly disposed of a gay male plaintiff's sex discrimination claims in *Martin v. Department of Correctional Services*.<sup>91</sup> The plaintiff's coworkers left sexually explicit photos in his work area and drew sexually explicit graffiti on the restroom walls, yard booths, and the plaintiff's time card and interoffice mail.<sup>92</sup> They also harassed him with derogatory language, like "cocksucker" and "fucking faggot."<sup>93</sup> But because the court found no evidence that Martin acted in an effeminate manner,<sup>94</sup> it granted the defendant's motion for summary judgment.<sup>95</sup> It ruled that in order to ensure that plaintiffs do not bootstrap sexual orientation claims under Title VII, "a plaintiff must demonstrate that he does not, or at the very least is not perceived to, act masculine"<sup>96</sup> in order to make out an actionable case of sex discrimination.

While not all gay men are effeminate, and not all straight men are "macho," *Martin* illuminates the troubling necessity for a homosexual plaintiff to emphasize his "femininity" in his complaint in order to convince the court that sex discrimination, not sexual orientation discrimination, was the root of his harassment. As one commentator has put it: "[E]ntitlement to Title VII protection ultimately depends on spurious factors such as whether the particular words and actions used by harassers



are sufficiently 'sexual,' whether the victim is an 'effeminate' or 'masculine' homosexual, and whether the victim pleads his claim in language sanctioned by the courts that downplays or does not mention if the plaintiff is gay."<sup>97</sup> Under this jurisprudence, Title VII will protect the stereotypically effeminate gay man, but not the gay man who "acts straight," or passes as stereotypically masculine. This also presents a problem for the male plaintiff who is deemed to be too feminine by his coworkers, but not quite feminine enough for the court to find that he was a victim of sex stereotyping.

Heterosexual men who are perceived as gay have also had difficulty establishing Title VII claims. For example, in *Hamm v. Weyauwega Milk Products, Inc.*,<sup>98</sup> coworkers called Michael Hamm, a straight male, a "faggot" and a "Girl Scout."<sup>99</sup> There were rumors that Hamm had a relationship with another male employee, and coworkers often asked him whether he had a girlfriend and why he was not married.<sup>100</sup> After Hamm complained of sexual harassment, he was fired. Hamm then sued his former employer under Title VII. Concluding that the term "Girl Scout" was unrelated to gender, the court found that Hamm was not a victim of sex discrimination; rather, he was harassed because of his perceived homosexuality.

In this case, the gender nonconformity suggested by the term "Girl Scout" was hidden behind the "faggot" epithet. Hamm suggested to the court that "when a heterosexual male is harassed and the basis offered for the harassment is 'perceived homosexuality,' then it is likely and reasonable to infer that gender stereotyping is present and is the real basis for the harassment."<sup>101</sup> The court rejected this argument, insisting that "courts have never focused on the sexuality of the parties involved when determining whether sexual harassment occurred." *Hamm* offers another example of how courts fail to distinguish conduct and status. Ironically, the court defined Hamm's heterosexual status as irrelevant and at the same time made his status as a perceived homosexual determinative.

*Hamm* also illustrates that discrimination based on sexual orientation, or perceived homosexuality, is in itself a form of sex discrimination. Social norms prescribe that men should be sexually attracted only to women, should date only women, and ultimately should marry women. "It is essential to the maintenance of heterosexism that these two genders are interpreted as . . . being 'naturally' attracted to one another."<sup>102</sup> Deviation from this pattern of normative behavior arouses suspicion. Hamm's coworkers discriminated against Hamm because he was unmarried and may not have had a girlfriend. This case is an example of how courts have declined "to recognize that sanctions levied on individuals for behaving or presenting themselves in a fashion commonly associated with homosexual orientation or transgender status are themselves a function of community disapproval of the plaintiff's refusal or failure to adhere to gendered notions about appearance, attire, as well as sexual and nonsexual behavior."<sup>103</sup>

In *Oiler v. Winn-Dixie Louisiana, Inc.*,<sup>104</sup> the court held that an employer had not engaged in sex discrimination when it fired the male plaintiff for presenting himself as a woman outside of work. In his off time, Peter Oiler, a truck driver for Winn-Dixie, occasionally adopted a female name, Donna, and wore makeup, skirts, nail polish, a bra, and silicone prostheses to enlarge his breasts.<sup>105</sup> After the president of Winn-Dixie learned that Oiler sometimes appeared in public as Donna, Oiler was fired.<sup>106</sup> At trial, Oiler's supervisor testified that crossdressing was "unacceptable" in the area where Oiler worked, indicating

there was "a large customer base there that have various beliefs, be it religion or a morality or family values or people that just don't want to associate with that type of behavior . . ."<sup>107</sup>

Winn-Dixie contended that Oiler had not been terminated for refusing to adhere to masculine stereotypes, but instead because he was a man who publicly pretended to be a woman.<sup>108</sup> The district court accepted this distinction and agreed that Oiler was not a victim of sex discrimination. The court distinguished the case from *Price Waterhouse*, maintaining that "the plaintiff [in *Price Waterhouse*] may not have behaved as the partners thought a woman should behave, but she never pretended to be a man [n]or adopted a masculine persona."<sup>109</sup>

*Oiler* is yet another example of the courts' insistence on maintaining a gender dichotomy. In Oiler's own words: "[T]oo many people don't see the middle ground between black and white. And that's where people in my situation really are. People hadn't even heard the word transgender. There are a whole bunch of people in the middle."<sup>110</sup> So long as courts refuse to recognize that gender identity discrimination and sex discrimination are parts of the same whole, individuals like Oiler, who identify as male, but also want to express female parts of their identity, will remain vulnerable to discrimination in the workplace.

#### IV. RECENT EXCEPTIONS TO THE RULE

There is some reason for optimism, however. Several non-gender-conforming plaintiffs have recently succeeded on sex discrimination claims. In *Nichols v. Azteca Restaurant Enterprises, Inc.*, plaintiff Antonio Sanchez alleged that he was verbally harassed for not adhering to social demands of masculinity.<sup>111</sup> Coworkers used feminine pronouns to refer to Sanchez and mocked him for walking and carrying his serving tray "like a woman."<sup>112</sup> The Ninth Circuit held that the evidence that other employees referred to Sanchez using female gender pronouns and taunted him for behaving like a woman amounted to actionable gender stereotyping.

In *Rene v. MGM Grand Hotel, Inc.*, Medina Rene, an openly gay man, worked as part of an all-male butler staff.<sup>113</sup> Rene was constantly harassed by his coworkers, who called him "sweetheart," "muñeca," and "fucking female whore."<sup>114</sup> They told crude jokes, gave him sexually oriented 'gifts,' and forced him to look at pornography.<sup>115</sup> Rene was also repeatedly sexually assaulted; his coworkers touched him "like they would to a woman," grabbed his crotch, and poked their fingers in his anus.<sup>116</sup>

The district court dismissed Rene's Title VII suit, finding that Rene was targeted because he was gay,<sup>117</sup> but the Ninth Circuit reversed. The appellate court found that since the assaults targeted sexual body parts, Rene had been harassed "because . . . of sex,"<sup>118</sup> and whatever else may have motivated the attacks was of no legal consequence. The court cited *Oncale*, noting that the plaintiff "did not need to show that he was treated worse than members of the opposite sex. It was enough to show that he suffered discrimination *in comparison to other men*."<sup>119</sup> However, the court's decision in favor of Rene relied heavily on the severity of the offensive sexual contact; had Rene not been sexually assaulted, or had the touching been less egregious, the court may not have ruled in his favor.<sup>120</sup>

Although the majority ignored the fact that Rene's coworkers called Rene "sweetheart," "muñeca," and "fucking female whore," and missed the logical conclusion that Rene was

targeted because his coworkers did not find him to be masculine enough, three concurring judges found that this was a case of actionable gender stereotyping.<sup>121</sup> Circuit Judge Harry Pregerson pointed to the evidence that Rene's coworkers touched him and spoke to him "like a woman."<sup>122</sup> "There would be no reason for Rene's coworkers to whistle at Rene 'like a woman,' unless they perceived him to be not enough like a man and too much like a woman," Pregerson wrote.<sup>123</sup> "This is gender stereotyping, and that is what Rene meant when he said he was discriminated against because he was *openly* gay."<sup>124</sup> Thus, some judges are beginning to understand that men who are harassed for being gay are targeted because they do not conform to their coworkers' expectations of what a 'real man' is like, and that this is sex discrimination.

In two recent cases, the Sixth Circuit concluded that Title VII prohibits employment discrimination against individuals who do not present themselves as members of the gender they were assigned on the basis of biological sex. In *Smith v. City of Salem*,<sup>125</sup> plaintiff Jimmie Smith was a lieutenant in the City Fire Department. When Smith started "expressing a more feminine appearance" at work, his coworkers commented on Smith's appearance and told him that he was not acting "masculine enough."<sup>126</sup> After Smith informed his supervisor that he intended to transition into living as a woman, the department planned to fire Smith.<sup>127</sup>

The district court dismissed Smith's sex discrimination claim, ruling that Title VII does not prohibit discrimination against transgender people.<sup>128</sup> The Sixth Circuit reversed, reasoning that:

"[a]fter *Price Waterhouse*, an employer who discriminates against women because, for instance, they do not wear dresses or makeup is engaging in sex discrimination because the discrimination would not occur but for the victim's sex. It follows that employers who discriminate against men because they *do* wear dresses and makeup, or otherwise act femininely, are also engaging in sex discrimination, because the discrimination would not occur but for the victim's sex."<sup>129</sup>

Smith alleged that his conduct and mannerisms did not conform to his employers' and coworkers' ideas of how a man should look and behave.<sup>130</sup> The court agreed that if this were the basis for his termination, Smith had an actionable sex discrimination claim: "Discrimination against a plaintiff who is a transsexual – and therefore fails to act and/or identify with his or her gender – is no different from the discrimination directed against Ann Hopkins in *Price Waterhouse*, who, in sex-stereotypical terms, did not act like a woman. Sex stereotyping based on a person's non-gender conforming behavior is impermissible discrimination, irrespective of the cause of that behavior; a label, such as 'transsexual,' is not fatal to a sex discrimination claim . . ."<sup>131</sup>

In *Barnes v. City of Cincinnati*,<sup>132</sup> the plaintiff, Philecea Barnes, had been an officer in the Cincinnati Police Department for seventeen years. Barnes presented himself as a man while

on-duty, and as a woman while off-duty. He had a French manicure, arched eyebrows, and occasionally came to work wearing makeup.<sup>133</sup> After Barnes was promoted to sergeant,<sup>134</sup> he was the only sergeant subjected to extra supervision during the probationary period.<sup>135</sup> Rumors circulated through the police department that Barnes was either homosexual or bisexual.<sup>136</sup> One of Barnes' supervisors told him that he did not appear to be "masculine" and needed to stop wearing makeup.<sup>137</sup> Another supervisor told Barnes that he was going to fail probation because he was not "acting masculine enough."<sup>138</sup> Although his scores were above the minimum for passing, and even higher than at least one other sergeant who passed the probationary period, Barnes failed.<sup>139</sup> According to several other officers, Barnes lacked "command presence" and did not have the respect of his subordinates.<sup>140</sup> Barnes was the only person to fail probation between 1993 and 2000.<sup>141</sup>

At trial, Barnes successfully claimed that his demotion from sergeant violated Title VII, and the jury found in his favor.<sup>142</sup> Barnes argued that he was discriminated against because he failed to conform to sex stereotypes.<sup>143</sup> The Sixth Circuit upheld the judgment on appeal, holding that Barnes had produced evidence sufficient to support his claim of sex discrimination. The court relied on the comments made by his superior officers and noted that Barnes was singled out for intense scrutiny. It also found that Barnes's "ambiguous sexuality" and his practice of dressing as a woman outside of work were well-known within the CPD.<sup>144</sup>

One of the most recent cases involving a transgender plaintiff was *Schroer v. Billington*.<sup>145</sup> Diane Schroer was born a biological male. Before she legally changed her name or began presenting herself as a woman, she applied for job at the Library of Congress. She interviewed as "David," her legal name at the time, and wore traditional male clothing. After she was hired, Schroer told the interviewer that she was transgender, would be transitioning from male to female, and would begin work as Diane. The next day, Schroer was informed that she was "not a good fit," and the job offer was retracted. Schroer then brought a Title VII suit against the Library of Congress.<sup>146</sup>

The court granted summary judgment in favor of

Schroer, finding that she was a victim of sex discrimination. District Judge James Robertson observed that the Library may have perceived Schroer as "an insufficiently masculine man, an insufficiently feminine woman, or an inherently non-gender-conforming individual" and that each of the three amounted to impermissible sex stereotyping.<sup>147</sup> The court also agreed with Schroer's argument that "because gender identity is a component of sex, discrimination on the basis of gender identity is sex discrimination."<sup>148</sup>

It determined that the Library had violated Title VII's plain language prohibiting discrimination "because of . . . sex" when it revoked its offer upon learning that Schroer, a biological male, intended to become "legally, culturally, and physically, a woman named Diane."<sup>149</sup> The court noted, critically, that other courts "have allowed their focus on the *label* 'transsexual' to blind them to the statutory language

*Sex stereotyping based on a person's non-gender conforming behavior is impermissible discrimination, irrespective of the cause of that behavior; a label, such as 'transsexual,' is not fatal to a sex discrimination claim . . . "*

itself.”<sup>150</sup>

The *Schroer* decision indicates that federal courts are beginning to acknowledge that discrimination based on sexual orientation, gender identity, and gender expression are all forms of sex discrimination. Individuals like Peter Oiler, Diane Schroer, and Medina Rene experienced discrimination because they did not conform to their employers’ expectations of masculinity. Demanding that a person behave or present himself or herself in a certain way at work because of the gender that society assigned to that person based on his or her genitals is sex discrimination. The Supreme Court has held already that sex stereotyping violates Title VII; breaking down the socially-constructed gender dichotomy may go past the Court’s analysis in *Price Waterhouse*, but it is the logical next step. Moreover, analyzing Title VII claims would be far easier for courts if they stopped trying to maintain a gender divide that has become increasingly non-credible.<sup>151</sup>

## V. TITLE VII AND CONGRESSIONAL INTENT

The remaining question is whether a broadened conception of sex discrimination conflicts with congressional intent. Many courts have refused to extend Title VII’s protections to homosexual or transsexual plaintiffs on the grounds that doing so would contravene the purpose of Title VII. For instance, in *Ulane*, the Seventh Circuit declared, “[t]he total lack of legislative history supporting the sex amendment coupled with the circumstances of the amendment’s adoption clearly indicates that Congress never considered nor intended this 1964 legislation to apply to anything other than the traditional concept of sex. Had Congress intended more, surely the legislative history would have at least mentioned its intended broad coverage of homosexuals, transvestites, or transsexuals.”<sup>152</sup>

Courts and commentators who express this view ignore the fact that the Supreme Court left the legislative history of Title VII behind with *Price Waterhouse*. And in *Oncale*, where the Court acknowledged that same-sex harassment is actionable under Title VII, Justice Scalia – a strict textualist<sup>153</sup> and one of the most conservative Justices – wrote: “As some courts have observed, male-on-male sexual harassment in the workplace was assuredly not the principal evil Congress was concerned with when it enacted Title VII. But statutory provisions often go beyond the principal evil to cover reasonably comparable evils, and it is ultimately the provisions of our law rather than the principal concerns of our legislators by which we are governed.”<sup>154</sup> In light of courts’ gradually broadening interpretation of Title VII, their refusal to extend the statute’s protections to transgender and homosexual persons based on legislative history seems disingenuous. The court in *Schroer v. Billington* agreed, stating, “[t]he decisions holding that Title VII only prohibits discrimination against men because they are men, and discrimination against women because they are women, represent an elevation of ‘judge-supported legislative intent over clear statutory text.’”<sup>155</sup>

Some commentators who oppose an expanded reading of Title VII have pointed out that Congress has rejected proposals to amend Title VII to prohibit sexual orientation and gender identity discrimination.<sup>156</sup> They argue that this shows that Congress did not intend the statute to protect homosexual and transgender people. However, the *Schroer* Court expressly rejected such an argument, stating that the Supreme Court has cautioned

against using legislative history in this way:

Subsequent legislative history is a hazardous basis for inferring the intent of an earlier Congress. It is a particularly dangerous ground on which to rest an interpretation of a prior statute when it concerns, as it does here, a proposal that does not become law.

Congressional inaction lacks persuasive significance because several equally tenable inferences may be drawn from such inaction, including the inference that the existing legislation already incorporated the offered change.<sup>157</sup>

The *Schroer* Court suggested that Congress may have rejected the passage of bills that would amend Title VII to expressly prohibit gender identity discrimination because the statute already forbids it. Thus, the legislative “non-history” of Title VII may demonstrate that “some Members of Congress believe that the *Ulane* court and others have interpreted ‘sex’ in an unduly narrow manner . . . and that the statute requires, not amendment, but only correct interpretation.”<sup>158</sup> Joel Friedman, a professor of law at Tulane Law School, has argued that interpreting discrimination on the basis of “sex” to encompass sexual orientation and gender identity discrimination would not circumvent congressional intent.<sup>159</sup> He points out that Congress often paints “in broad remedial strokes,” leaving the work of interpretation up to the courts.<sup>160</sup>

Moreover, the courts’ narrow interpretation of Title VII frustrates the statute’s broad remedial purpose.<sup>161</sup> By refusing to protect gay men, lesbians, bisexual, and transgender people who face discrimination because they do not conform to a binary gender system, “courts perpetuate the very subordination that Title VII was designed to eliminate.”<sup>162</sup> Courts’ insistence on maintaining a strict gender dichotomy reinforces the notion that women and men “are” and “should be” a certain way. If employers are allowed to demand that men not act “like women,” this sends a message to all people that being “feminine” is not a very good way to be – reinforcing patriarchy in the workplace and society as a whole. This result is antithetical to the statute’s goal of “plac[ing] women on equal footing with men.”<sup>163</sup>

## CONCLUSION

“[T]he world will not be safe for women in frilly pink dresses . . . unless and until it is made safe for men in dresses as well.”<sup>164</sup> The refusal of courts to recognize gender nonconformity discrimination as sex discrimination legitimizes social devaluation of the feminine. Instead of breaking down barriers in the workplace, as Title VII was intended to do, courts are actually reinforcing stereotypes about men and women when they allow employers to discriminate against non-gender-conforming men. In *Price Waterhouse*, the Supreme Court declared that “gender must be irrelevant to employment decisions.”<sup>165</sup> To give proper effect to Title VII, courts must recognize sexual orientation, gender identity, and gender expression discrimination as sex discrimination and interpret the statute so as to protect individuals no matter where they fall along the gender continuum.

## ENDNOTES

\* J.D. UCLA School of Law, 2008; B.A., Rice University, 2005. Law Clerk to the Honorable Philip S. Gutierrez, U.S. District Court for the Central District of California.

<sup>1</sup> Title VII of the 1964 Civil Rights Act, 42 U.S.C. § 2000e et seq. (providing that “it shall be an unlawful employment practice . . . to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment because of . . . sex[.]”).

<sup>2</sup> *Holloway v. Arthur Andersen & Co.*, 566 F.2d 659, 662 (9th Cir. 1977).

<sup>3</sup> In 2006, approximately eighty-five percent of the sexual harassment complaints under Title VII were brought by women. Equal Employment Opportunity Commission, *Sexual Harassment Charges: EEOC & FEPAs Combined, FY 1997 – FY 2006*, <http://www.eeoc.gov/stats/harass.html> (last visited Oct. 16, 2008). Of course, this means that more than one in seven Title VII claims is brought by a man – a far from insignificant number.

<sup>4</sup> See, e.g., Joel Wm. Friedman, *Gender Nonconformity and the Unfulfilled Promise of Price Waterhouse v. Hopkins*, 14 DUKE J. GENDER L. & POL’Y 205 (2007); Mary Ann Case, *Disaggregating Gender from Sex and Sexual Orientation: The Effeminate Man in the Law and Feminist Jurisprudence*, 105 YALE L.J. 1 (1995); Katherine M. Franke, *The Central Mistake of Sex Discrimination Law: The Disaggregation of Sex from Gender*, 144 U. PA. L. REV. 1 (1995); Marvin Dunson III, Comment, *Sex, Gender, and Transgender: The Present and Future of Employment Discrimination Law*, 22 BERKELEY J. EMP. & LAB. L. 465 (2001) (agreeing that “on a theoretical level,” transgender individuals are protected by existing sex discrimination laws, but arguing that “on a practical level,” the category “gender identity” should be added to employment discrimination statutes to ensure transgender people are protected); cf. Nailah A. Jaffree, Note, *Halfway Out of the Closet: Oncale’s Limitations in Protecting Homosexual Victims of Sex Discrimination*, 54 FLA. L. REV. 799 (2002).

<sup>5</sup> Friedman, *supra* note 4, at 205.

<sup>6</sup> See, e.g., Case, *supra* note 4.

<sup>7</sup> “Transgender” refers to individuals whose gender identity or expression does not conform to that typically associated with their sex. “Gender identity,” in turn, refers to one’s innate sense of being male or female. “Gender expression” is the manifestation of one’s feeling masculine or feminine through clothing, behavior, or grooming. Gender Public Advocacy Commission (GPAC), *Definition of Terms*, <http://www.gpac.org/workplace/terms.html> (last visited Oct. 17, 2008).

<sup>8</sup> I. Bennett Capers, *Sex(ual) Orientation and Title VII*, 91 COLUM. L. REV. 1158, 1166–67 (1991) (“When lesbians and gays question a society that denies them the right to adopt children, they question a society that says it is a woman’s place to raise children, a man’s place to be the breadwinner, and both are needed to constitute a family. When lesbians and gays question a society that denies them the right to express their love physically, they question a society that says a woman’s body is not her own, but is still the subject of government control. And lastly, when lesbians and gays question a society that denies them basic employment rights, they question a society that says, more than a quarter of a century after Title VII’s enactment, a woman is worth only seventy cents for every dollar made by a man”).

<sup>9</sup> Cf. *id.* at 1160, 1166. Capers actually makes these arguments about homosexual relationships, but I believe they apply equally to transgender individuals.

<sup>10</sup> See *id.* at 1170.

<sup>11</sup> *Id.*

<sup>12</sup> See Dunson, *supra* note 4, at 499 (“Transgenders, by definition, challenge sex stereotypes (namely, the stereotype that if one has a vagina, one must present as a woman”).

<sup>13</sup> *Holloway v. Arthur Andersen & Co.*, 566 F.2d 659 (9th Cir. 1977).

<sup>14</sup> *Id.* at 661.

<sup>15</sup> *Id.*

<sup>16</sup> *Id.*

<sup>17</sup> *Id.* at 661 n.1.

<sup>18</sup> Dunson, *supra* note 4, at 470.

<sup>19</sup> 566 F.2d at 663.

<sup>20</sup> *Id.* at 664.

<sup>21</sup> *Id.* at 662–63.

<sup>22</sup> *Id.* at 664.

<sup>23</sup> *Id.* (Goodwin, J., dissenting).

<sup>24</sup> *Id.* at 664.

<sup>25</sup> 566 F.2d at 664.

<sup>26</sup> *Id.* at 661.

<sup>27</sup> *Ulane v. Eastern Airlines*, 742 F.2d 1081 (7th Cir. 1984).

<sup>28</sup> *Id.* at 1083.

<sup>29</sup> *Id.*

<sup>30</sup> *Id.* at 1085.

<sup>31</sup> *Id.*

<sup>32</sup> The Supreme Court held that gender stereotyping is impermissible sex discrimination in *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989).

<sup>33</sup> *Id.* at 250–51 (plurality opinion).

<sup>34</sup> *Id.* at 233.

<sup>35</sup> *Id.*

<sup>36</sup> *Id.* at 234.

<sup>37</sup> *Id.* at 234.

<sup>38</sup> *Price Waterhouse*, 490 U.S. at 235.

<sup>39</sup> *Id.*

<sup>40</sup> *Id.*

<sup>41</sup> *Id.* at 237.

<sup>42</sup> *Id.* at 251 (internal punctuation omitted).

<sup>43</sup> *Id.* at 240.

<sup>44</sup> *Price Waterhouse*, 490 U.S. at 250.

<sup>45</sup> Case, *supra* note 4, at 46–70 (arguing that if masculine women were protected but effeminate men could be legally discriminated against, “this would send a strong message of subordination to women, because it would mean that feminine qualities, which women are disproportionately likely to display, may legitimately be devalued . . .”); Capers, *supra* note 8, at 1180–81.

<sup>46</sup> Case, *supra* note 4, at 54–58. Case suggests that “even if it is not permissible to fire [an effeminate man] for his effeminacy, it may be permissible to fire him for the sexual orientation that is presumed and may in fact go with it.” See also Jaffree, *supra* note 4, at 807 (“A woman who ‘acts like a man’ is unreservedly protected, in recognition of the unjust Catch-22 of an ambitious woman working in a ‘man’s world,’ while men who ‘act like women’ are labeled homosexual, a class repeatedly not protected under Title VII”).

<sup>47</sup> *Dillon v. Frank*, 1992 U.S. App. LEXIS 766 (1992).

<sup>48</sup> *Id.* at \*2.

<sup>49</sup> *Id.* at \*3.

<sup>50</sup> *Id.* at \*3–4.

<sup>51</sup> *Id.* at \*15.

<sup>52</sup> *Id.* at \*18.

<sup>53</sup> *Dillon*, 199 U.S. App. LEXIS at \*22.

<sup>54</sup> *Id.* at \*28–30.

<sup>55</sup> “[I]t is generally taken as a given that when a female employee is harassed in explicitly sexual ways by a male worker or workers, she has been discriminated against ‘because of’ sex.” *Doe v. City of Belleville*, 119 F.3d 563, 574 (7th Cir. 1997). Courts assume that male harassers who target women are either motivated by sexual desire or hostility to women in the workplace; consequently, pre-*Oncale*, they generally ignored, or took as a given, the “because of . . . sex” causal requirement in Title VII. Andrea Meryl Kirshenbaum, “‘Because of . . . Sex’: Rethinking the Protections Afforded Under Title VII in the Post-*Oncale* World,” 69 ALB. L. REV. 139, 148 (2005).

<sup>56</sup> *Doe*, 119 F.3d at 575 (criticizing other federal courts for demanding “proof, above and beyond the sexual content of the harassment itself, that the plaintiff was singled out for harassment because of sex”). The Seventh Circuit pointed out that the fact that a plaintiff is male “should not make for an entirely different analysis, particularly for purposes of a statute that forbids sex discrimination.” See also *Andrews v. Philadelphia*, 895 F.2d 1469, 1482 n.3 (3d Cir. 1990) (suggesting that sexual propositions, innuendo, pornographic materials, and sexual derogatory language should be accepted as evidence of an intent to discriminate on the basis of sex); *Nichols v. Frank*, 42 F.3d 503, 511 (9th Cir. 1994) (“[S]exual harassment is ordinarily based on sex. What else could it be based on?”); David S. Schwartz, *When is Sex Because of Sex?: The Causation Problem in Sexual Harassment Law*, 150 U. PA. L. REV. 1697 (2002).

<sup>57</sup> *Id.* at 575.

<sup>58</sup> Case, *supra* note 4, at 57.

<sup>59</sup> *Centola v. Potter*, 183 F. Supp. 2d 403, 410 (D. Mass. 2002).

<sup>60</sup> Case, *supra* note 4, at 60.

<sup>61</sup> Indeed, non-gender-conforming biological males – including youth – are frequently bullied and beaten, even killed. In a 2004 California study, fifty-four percent of young people reported that their school was unsafe for guys who aren’t as masculine as other guys. GENDER PUBLIC ADVOCACY COMMISSION (GPAC), 50 UNDER 30: MASCULINITY AND THE WAR ON AMERICA’S YOUTH (2006), available at <http://www.gpac.org/50under30/50u30.pdf>. GPAC examined fifty murders of non-gender-conforming youth that occurred between 1996 and 2005. Ninety-two percent of the victims were biologically male but not presenting masculinely. *Id.* at 4. Almost all of the victims were killed with extreme violence, suggesting that the attacks were motivated by “intense rage and loathing.” *Id.* at 5. See also, Case, *supra* note 4, at 26 (“Tomboys are far more acceptable and unproblematic today than are sissies . . .”).

- <sup>62</sup> Peter Nicholas, *Gov. Criticizes Legislators as "Girlie Men"*, L.A. TIMES, July 18, 2004, at B1.
- <sup>63</sup> Joanna Grossman & Linda McClain, *The "Girlie Men" Slur and Other Insults*, FINDLAW'S WRIT, Sep. 21, 2004, [http://writ.news.findlaw.com/commentary/20040921\\_mcclain.html](http://writ.news.findlaw.com/commentary/20040921_mcclain.html) (last visited Oct. 18, 2008).
- <sup>64</sup> *Id.*
- <sup>65</sup> Case, *supra* note 4, at 29. Case contends that now, it may be better to be seen as a "masculine" woman than a "feminine" one. "[I]n the employment market and the law, the axis of comparative desirability may have shifted from one favoring gender conformity to one favoring masculinity pure and simple, whether manifested by men or women." *Id.* at 31. She cites research which shows that as women have moved into the work force and into positions of authority over the past fifty years, the pitch of their speaking voices has dropped considerably. "[W]omen in this society are, as a descriptive matter, moving closer to a masculine standard and, as a normative matter, are rewarded for so doing." *Id.* at 29.
- <sup>66</sup> *Id.* at 47.
- <sup>67</sup> Doe v. City of Belleville, 119 F.3d 563 (7th Cir. 1997).
- <sup>68</sup> *Id.* at 566.
- <sup>69</sup> *Id.* at 567.
- <sup>70</sup> *Id.*
- <sup>71</sup> *Id.* at 566. This case predated *Oncale v. Sundowner Offshore Servs., Inc.*, 523 U.S. 75 (1998), in which the Supreme Court held that same-sex harassment is actionable under Title VII.
- <sup>72</sup> *Id.* at 578. The following year, however, the Supreme Court remanded Doe for reconsideration in light of its decision in *Oncale*. It is unknown how Doe came out upon remand; given the restrictive guidelines the *Oncale* Court laid out for proving same-sex harassment claims, the Doe plaintiff may very well have lost.
- <sup>73</sup> 119 F.3d at 568.
- <sup>74</sup> 523 U.S. 75 (1998).
- <sup>75</sup> *Id.* at 77.
- <sup>76</sup> GPAC, *Frequently Asked Questions*, <http://www.gpac.org/workplace/faq.html> (last visited Oct. 19, 2008). These details about Oncale's appearance did not appear in the Supreme Court's opinion.
- <sup>77</sup> 523 U.S. at 79.
- <sup>78</sup> *Id.* at 77.
- <sup>79</sup> *Id.* at 79.
- <sup>80</sup> *Id.* at 81.
- <sup>81</sup> *Id.* at 80.
- <sup>82</sup> *Oncale*, 523 U.S. at 80.
- <sup>83</sup> 523 U.S. at 80-81.
- <sup>84</sup> *Id.* at 82. Justice Scalia made room in his sparse analysis to remind courts that common sense tells us that "simple teasing or roughhousing among members of the same sex" does not amount to actionable sexual harassment. "A professional football player's working environment is not severely or pervasively abusive, for example, if the coach smacks him on the buttocks as he heads into the field . . ." This part of his opinion seems to me to be tinged with homophobia – Scalia seems to be tripping over himself in his eagerness to point out that most male-on-male contact is purely "straight." After all, the "presumptively heterosexual" football player and coach, Jane Halley, *Sexuality Harassment*, in LEFT LEGALISM/LEFT CRITIQUE 80 (Wendy Brown and Jane Halley eds., 2002), represent the epitome of "manliness."
- <sup>85</sup> Friedman, *supra* note 4, at 222.
- <sup>86</sup> A class discussion in Professor Christine Littleton's Sex Discrimination seminar at UCLA Law School in Spring 2007 brought this point to my attention.
- <sup>87</sup> Bibby v. Coca-Cola, 260 F.3d 257 (3d Cir. 2001).
- <sup>88</sup> *Id.* at 260. Sexual graffiti including the plaintiff's name also appeared on the bathroom walls.
- <sup>89</sup> *Id.*
- <sup>90</sup> Case, *supra* note 4, at 26-27, points out, "Tomboys are far more acceptable and unproblematic today than are sissies, who, it is still feared, are at a high risk of growing up to be homosexual or transsexual and for whom clinical treatment is more often prescribed. This is further evidence of the disproportionate pull of gender – masculinity in a girl is approved while femininity in a boy is not only troublesome, but a marker for homosexual orientation."
- <sup>91</sup> Martin v. Dep't of Correctional Servs., 224 F. Supp. 2d 434 (N.D.N.Y. 2002).
- <sup>92</sup> *Id.* at 441.
- <sup>93</sup> *Id.*
- <sup>94</sup> *Id.* at 446.
- <sup>95</sup> *Id.* at 447.
- <sup>96</sup> *Id.*
- <sup>97</sup> Jaffree, *supra* note 4, at 816-17.
- <sup>98</sup> Hamm v. Weyauwega Milk Products, Inc., 199 F. Supp. 2d 878 (E.D. Wis. 2002).
- <sup>99</sup> *Id.* at 882.
- <sup>100</sup> *Id.*
- <sup>101</sup> *Id.* at 894.
- <sup>102</sup> Capers, *supra* note 8, at 1160.
- <sup>103</sup> Friedman, *supra* note 4, at 238.
- <sup>104</sup> Oiler v. Winn-Dixie Louisiana, Inc., 2002 U.S. Dist. LEXIS 17417 (E.D. La. 2002).
- <sup>105</sup> *Id.* at \*6.
- <sup>106</sup> *Id.* at \*8-9.
- <sup>107</sup> *Id.* at \*8-9.
- <sup>108</sup> *Id.* at \*28.
- <sup>109</sup> *Id.* at \*29.
- <sup>110</sup> GPAC, *GenderPAC National News Interviews Peter Oiler*, Feb. 20, 2001, <http://www.gpac.org/archive/news/notitle.html?cmd=view&archive=news&msgnum=0275> (last visited Oct. 19, 2008).
- <sup>111</sup> Nichols v. Azteca Rest. Enter., Inc., 256 F.3d 864 (9th Cir. 2001).
- <sup>112</sup> *Id.* at 870.
- <sup>113</sup> Rene v. MGM Grand Hotel, Inc., 305 F.3d 1061, 1064 (9th Cir. 2002).
- <sup>114</sup> *Id.* "Muñeca" is Spanish for "doll."
- <sup>115</sup> *Id.*
- <sup>116</sup> *Id.*
- <sup>117</sup> *Id.* at 1066.
- <sup>118</sup> *Id.* at 1066.
- <sup>119</sup> MGM Grand Hotel, Inc., 305 F.3d at 1067.
- <sup>120</sup> *Id.* at 1068 ("In sum, what we have in this case is a fairly straightforward sexual harassment claim. Title VII prohibits offensive physical conduct of a sexual nature when that conduct is sufficiently severe or pervasive." (internal citation omitted)).
- <sup>121</sup> *Id.* at 1068 (Pregerson, concurring).
- <sup>122</sup> *Id.*
- <sup>123</sup> *Id.* at 1069 n.2.
- <sup>124</sup> *Id.*
- <sup>125</sup> Smith v. City of Salem, 378 F.3d 566 (6th Cir. 2004).
- <sup>126</sup> *Id.* at 568.
- <sup>127</sup> *Id.*
- <sup>128</sup> The district court accused Smith of "invoke[ing] the term-of-art created by *Price Waterhouse*, that is, 'sex-stereotyping,' as an end run around his 'real' claim, which . . . was based upon his transsexuality." *Id.* at 571.
- <sup>129</sup> *Id.* at 574.
- <sup>130</sup> *Id.* at 574.
- <sup>131</sup> Smith, 378 F.3d at 575.
- <sup>132</sup> Barnes v. City of Cincinnati, 401 F.3d 729 (6th Cir. 2005).
- <sup>133</sup> *Id.* at 734.
- <sup>134</sup> Barnes placed eighteenth out of 105 officers who sat for the promotional exam. *Id.* at 733.
- <sup>135</sup> "The purpose of the probationary period is to allow superior officers to observe the individual to determine whether the person should remain in the position." *Id.* at 733. Barnes was told not to go into the field alone, was required to wear a microphone at all times, and had to ride in a car with a video camera during the final weeks of his probation. No other sergeants were evaluated in this manner. *Id.* at 734. One of the officers responsible for evaluating Barnes testified that Barnes had been placed in the special program "to target him for failure." *Id.* at 735.
- <sup>136</sup> Barnes, 401 F.3d at 733.
- <sup>137</sup> *Id.* at 735.
- <sup>138</sup> *Id.*
- <sup>139</sup> *Id.* Barnes's scores on the sergeant evaluation tests were higher than at least one other probationary sergeant.
- <sup>140</sup> *Id.* at 734. Nearly every officer asked to evaluate Barnes's "command presence" defined the term differently. Barnes's expert testified that "employers who use subjective factors, like 'command presence,' to evaluate an employee are engaging in stereotyping."
- <sup>141</sup> *Id.* at 735.
- <sup>142</sup> Barnes, 401 F.3d at 735.
- <sup>143</sup> *Id.* at 737.
- <sup>144</sup> *Id.* at 738.
- <sup>145</sup> Schroer v. Billington, 424 F. Supp. 2d 203 (D.C. 2006).
- <sup>146</sup> *Id.*
- <sup>147</sup> *Id.* at 210.
- <sup>148</sup> *Id.* at 207.
- <sup>149</sup> *Id.*

- <sup>150</sup> *Id.*
- <sup>151</sup> Eight states and eighty cities and local governments have adopted laws forbidding workplace discrimination based on gender identity/expression, and 193 major corporations have adopted gender identity/expression nondiscrimination policies. GPAC, *Statistics*, <http://www.gpac.org/workplace/Statistics.html> (last visited Oct. 19, 2008). GPAC believes that a tipping point has been reached, "with major corporations adding gender rights protections at an increasing rate." GPAC, *GENDER RIGHTS: THE NEW EDGE OF WORKPLACE FAIRNESS* (2006), available at <http://www.gpac.org/workplace/GenderRights.pdf>. GPAC notes that, encouragingly, some powerhouse companies in traditionally conservative industries, like finance and insurance, have adopted such policies. *Id.*
- <sup>152</sup> *Ulane v. Eastern Airlines, Inc.*, 742 F.2d 1081, 1085 (7th Cir. 1984).
- <sup>153</sup> Scalia believes that when judges interpret laws, they should be "guided by the text and not by intentions or ideals external to it, and by the original meaning of the text, not by its evolving meaning over time." Amy Gutmann, Introduction to ANTONIN SCALIA, *A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW* vii (Amy Gutmann, ed. 1998). Typically, Scalia looks only to the text of the law itself, eschewing investigation into legislative history.
- <sup>154</sup> *Oncale v. Sundowner Offshore Servs., Inc.*, 523 U.S. 75, 79 (1998).
- <sup>155</sup> *Schroer v. Billington*, No. 05-cv-01090 (D.D.C. Sept. 19, 2008) (citing *Zuni Pub. Sch. Dist. No. 89 v. Dep't of Educ.*, 127 S. Ct. 1534, 1551 (2007) (Scalia, J., dissenting)).
- <sup>156</sup> See, e.g., H.R. 2015, 110 Cong., 1st Sess. (2007); H.R. 3685, 110 Cong., 1st Sess. (2007), H.R. 3686, 110 Cong., 1st Sess. (2007); see also *Oiler v. Winn-Dixie Louisiana, Inc.*, 2002 U.S. Dist. LEXIS 17417, \*22 (collecting bills).
- <sup>157</sup> *Schroer v. Billington*, No. 05-cv-01090 (D.D.C. Sept. 19, 2008) (citing *Pension Ben Guar. Corp. v. LTV Corp.*, 496 U.S. 633, 650 (1990)).
- <sup>158</sup> *Schroer v. Billington*, No. 05-cv-01090 (D.D.C. Sept. 19, 2008).
- <sup>159</sup> Friedman, *supra* note 4, at 226. Friedman points out that Congress is "fully ready, willing, and able to overturn the Court's interpretations of its handiwork," but there is no "evidence of Congressional dissatisfaction with, or repudiation of, the Court's articulation of a sex-stereotype based model of sex-based discrimination." *Id.* at 227.
- <sup>160</sup> Friedman, *supra* note 4, at 227.
- <sup>161</sup> Capers, *supra* note 8, at 1169 (discussing broad purpose that courts have read into Title VII).
- <sup>162</sup> *Id.* at 1170.
- <sup>163</sup> *Holloway v. Arthur Andersen & Co.*, 566 F.2d 659, 662 (9th Cir. 1977).
- <sup>164</sup> Case, *supra* note 4, at 68.
- <sup>165</sup> *Price Waterhouse v. Hopkins*, 490 U.S. 228, 240 (1989) (plurality opinion).

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# LEGISLATIVE UPDATES

By Shiwali Patel

## **S. 3406 “ADA Amendments Act of 2008” Introduced by Senator Thomas Harkin (D-IA)**

This Act amends the Americans with Disabilities Act (“ADA”) of 1990 to make it more inclusive by redefining the term *disability*, and defining the phrases “major life activities” and “being regarded as having such an impairment.” It broadly construes disability as an impairment that substantially limits one major life activity, is episodic, or is in remission if it would substantially limit a major life activity when active. Whether an impairment “substantially limits a major life activity” will be determined without regard to how individuals function with mitigating measures, such as medications or hearing aids. Furthermore, this Act prohibits employment discrimination against individuals on the basis of their disability and only allows qualification standards, tests, or other selection criteria for employment that are related to the position and is consistent with the needs of the company.

In introducing this legislation, Congress intended to restore the original goal of the ADA, which has been hampered due to U.S. Supreme Court cases *Sutton v. United Air Lines, Inc.*<sup>1</sup> and *Toyota Motor Manufacturing, Kentucky, Inc. v. Williams*,<sup>2</sup> both of which have narrowed the scope of protection for persons with disabilities. By reestablishing the original intent of the ADA, the amendments should fulfill its goal of promoting equal opportunity, economic independence, and full participation in American society, particularly in employment.<sup>3</sup>

Senator Thomas Harkin from Iowa introduced this Act in July 2008 with 77 co-sponsors. In September 2008, the Senate and the House passed the ADA Amendments Act of 2008, and it was signed into law by the President on September 25, 2008.

## **H.R. 5950 “Immigrant Detainee Basic Medical Care Act of 2008” Introduced by Representative Zoe Lofgren (D-CA)**

This Act requires the Secretary of Homeland Security to establish procedures for providing mental and medical health care to all immigrant detainees in the custody of the Department of Homeland Security. These procedures must meet all of the detainees’ various medical needs including primary care, emergency care, chronic care, prenatal care, dental care, eye care, mental health care, medical dietary needs, and other specialized care. The Act also sets forth an administrative appeals process for denials of health care to ensure that the Secretary explains the reasons for the denial and to allow the onsite medical provider and detainee to appeal a denial or failure to provide health care.

Supporters of the bill have described it as long overdue given the many deaths of immigrants in detention facilities, and the many other detainees who were not provided proper care while in custody. In the past ten years, the use of detention facilities for holding undocumented immigrants has skyrocketed from a daily immigration detention capacity of 8,279 in 1996 to

a daily average of 33,000 detainees in 2007.<sup>4</sup> Instead of providing better health care, officials have been slow in reacting and defensive about criticisms of their inadequate services. Yet, it is hard to ignore the eighty-three immigrants who died in the last five years and the many others who have suffered because a loved one was denied basic care.<sup>5</sup>

Representative Zoe Lofgren from California introduced the Immigrant Detainee Basic Medical Care Act of 2008 with twenty-two co-sponsors.

## **S. 1315 Title IV “Veteran’s Benefits Enhancement Act of 2007 Filipino WW2 Veteran’s Matters” Introduced by Senator Daniel Akaka (D-HI)**

Title IV of this Act honors Filipino and Filipino-American World War II veterans by qualifying them for veteran’s benefits through the United States Department of Veterans Affairs. This Act also entitles children of Filipino and Filipino-American veterans to the same educational assistance as children of other veterans. In 1941, when President Franklin Roosevelt conscripted Filipino men and boys into the U.S. Army, he promised them full U.S. veteran benefits. After the war ended however, U.S. Congress went back on the promise, thereby disqualifying many Filipino veterans from benefits that were promised to them.<sup>6</sup> In an effort to rectify the situation, this Act will reward more than 18,000 Filipinos for their service to the United States during World War II, through benefits and other financial awards.<sup>7</sup>

Senator Daniel Akaka from Hawaii introduced this Act in May 2007 and it has passed both in the Senate and the House.

## **H.R. 3686 “To Prohibit Employment Discrimination Based on Gender Identity” Introduced by Representative Barney Frank (D-MA)**

This Act purports to eliminate employment discrimination on the basis of actual or perceived gender identity and allows individuals to bring disparate treatment claims to remedy discrimination. Under this Act, employers cannot refuse to hire, discharge, or discriminate against an individual with respect to benefits and conditions of employment because of their actual or perceived gender identity. The Act applies to employers’ enforcements of rules and policies, sexual harassment, access to facilities that are consistent with the employee’s gender identity, construction of new or additional facilities, and dress and grooming standards. It authorizes the Equal Employment Opportunity Commission, the Librarian of Congress, the Attorney General, and United States courts the same enforcement powers as they have under the Civil Rights Act of 1964, the Government Employees Act of 1991, and other specified laws.

Advocates state that employees risk being discriminatorily dismissed regardless of their qualifications or prior history when



disclosing their transgender status or when attempting to transition while working.<sup>8</sup> Though many states and employers have adopted laws and policies banning workplace discrimination based on gender identity, these laws are inadequate to remedy discrimination in jurisdictions without protections for workers who are fired or harassed because of their gender identity.<sup>9</sup> Title VII of the Civil Rights Act also does not provide a sufficient remedy for transgender workers. Although many civil rights advocates support the view that discrimination against someone for changing their sex is sex discrimination qualifying for Title VII protection, most courts have rejected that view.<sup>10</sup> Therefore, H.R. 3686 seeks to remedy these shortcomings in the law through finally legislating against employment discrimination based on gender identity.

Representative Barney Frank from Massachusetts introduced this Act in September 2007 and it has yet to be scheduled for debate or a vote in the House and the Senate.

### **S. 3245 “Justice Integrity Act of 2008” Introduced by Senator Joe Biden (D-DE)**

The purpose of this Act is to address racial and ethnic disparities in the criminal process, including subconscious bias

that influences decisions to criminalize persons based on race. The Act creates a pilot program in ten United States Districts to promote fairness in the criminal justice system. Under this Act, a United States attorney is designated to each District to implement a pilot program with an advisory group of judges, prosecutors, defense attorneys and other members of the criminal justice system. Each group would collect data on the race and ethnicity of defendants in each stage of the criminal justice process to determine the cause of the racial disparity. Essentially, this Act requires United States attorneys to oversee the criminal justice system in an attempt to reduce the racial and ethnic disparities that pervade the system.

Studies and reports show that extreme racial disparities in all processes of the criminal justice system exist, including arrests, charges, plea bargains, jury selection, convictions, and sentencing.<sup>11</sup> In prisons, racial minorities comprise two-thirds of persons convicted by state and federal courts.<sup>12</sup> Such inequality has decreased public trust in the criminal justice system. According to Senator Joe Biden, who introduced the Act, the Justice Integrity Act will ensure equal protection of the laws by addressing the subtle forms of racism that continue to plague the system.

Senator Joe Biden from Delaware introduced the Justice Integrity Act of 2008 in July 2008 with five co-sponsors.

## **ENDNOTES**

<sup>1</sup> See 527 U.S. 471, 493 (1999) (holding that whether an impairment substantially limits a major life activity will be determined by the ameliorative effects of mitigating measures).

<sup>2</sup> See 534 U.S. 184, 197 (2002) (holding that ‘substantially’ and ‘major’ under the ADA “need to be interpreted strictly to create a demanding standard for qualifying as disabled,” and to be substantially limited in performing a major life activity “an individual must have an impairment that prevents or severely restricts the individual from doing activities that are of central importance to most people’s daily lives”).

<sup>3</sup> ACLU Praises House Passage of ADA Amendments Act of 2008 (Sept. 17, 2008), <http://www.aclu.org/disability/gen/36823prs20080917/html>.

<sup>4</sup> *Problems with Immigration Detainee Medical Care: Hearing on the Detainee Basic Medical Care Act of 2008 Before the Subcomm. on Immigration, Citizenship, Refugees, Border Sec. & Int’l Law of the H. Comm. on the Judiciary*, 110th Cong. (2008) (testimony of Mary M. McCarthy, Executive Director, National Immigrant Justice Center).

<sup>5</sup> *Id.*

<sup>6</sup> See William Mann, *House Passes Bill to Reward Filipino WWII Vets*, WASHINGTON POST, Sept. 23, 2008 (describing that Congress reversed President Roosevelt’s promise to provide full benefits through the Recissions Acts of 1946).

<sup>7</sup> *Id.*

<sup>8</sup> *An Examination of Discrimination Against Transgender Americans in the Workplace: Hearing on H.R. 3686 Before the Subcomm. on Health, Educ., Labor and Pensions of the H. Comm. on Educ. and Labor*, 110th Cong. 4 (2008) (statement of Shannon P. Minter, Legal Director, National Center for Lesbian Rights).

<sup>9</sup> *Id.* at 5.

<sup>10</sup> *Id.*

<sup>11</sup> *Sen. Joe Biden Introduces Justice Integrity Act, Establishes Program to Study Racial Disparities in the Criminal Justice System*, THE SENTENCING PROJECT, July 10, 2008, <http://www.sentencingproject.org/NewsDetails.aspx?NewsID=659>.

<sup>12</sup> *Id.*

### **PRINTING INFORMATION**

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Starting with this issue of *The Modern American*, we will print issues in accordance with the standards established by the Forest Stewardship Council (“FSC”) that are designed to eliminate habitat destruction, water pollution, displacement of indigenous peoples and violence against people and wildlife that often accompanies logging.

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*"Congress shall make no law respecting an establishment of religion. . . ."*

*- First Amendment of the Constitution of the United States of America*

Although the United States is constitutionally bound by the separation of church and state, religion has undoubtedly had a major influence on American law and policy. Religion has influenced discourse concerning a variety of issues in America including reproductive rights, foreign policy, marriage, social services, and education. This symposium will revisit the implications of the Establishment Clause, explore to what extent the separation of church and state in America has held true, and discuss which religions have the most legal and political influence, why they do, and the effect such influence has in a religiously and culturally diverse America. The symposium will also analyze recent legislation and state constitutional amendments as well as the interaction between the American people, religion, and state in the regulation of morality.

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**THE MODERN AMERICAN**

American University  
Washington College of Law  
4801 Massachusetts Avenue, NW  
Suite 615  
Washington, DC 20016-8181  
(202) 274-4247

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